

Leage has always been a favourite with students. Its simple and straightforward exposition of what is for the most part a very technical subject accounts for this popularity. The new edition seeks to maintain and even to extend this quality, whilst at the same time bringing the work up to date and meeting the criticisms levelled at it. The advances in Roman law scholarship and the great heightening in the standards expected of students have necessitated many changes. In fact, some five-sixths of the text is completely the work of the editor, while the remainder has been exhaustively revised. The total length of the book has been almost doubled, the change in the format keeping the volume within manageable proportions.

Besides the drastic changes in the text the most notable differences are: the inclusion of a short historical sketch of Roman history and of the 'after-history' of Roman law; the elimination of all footnotes and the putting of all cross-references in the body of the text; the inclusion of short sections on co-ownership and representation in litigation; and the introduction of two appendices, English versions of typical *formulae* and a short bibliography. However, the most important changes have been shifts of emphasis towards a fuller treatment of Roman ideas and concepts and of Roman legal method and a greater concentration on the classical law.

LEAGE'S ROMAN PRIVATE LAW

FOUNDED ON THE *INSTITUTES*
OF GAIUS AND JUSTINIAN

THIRD EDITION

BY

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PREFACE TO THE THIRD EDITION

SINCE it first appeared in 1906 *Leage* has been, perhaps more than any other Law book, certainly more than any other Roman law work, a *students'* textbook — written purely for the student, suited to his needs, and very much appreciated by him, if not always by his teacher or by the more profound scholar. The simple and straightforward setting out of the main rules of Roman law was ideal for giving an introduction to the subject and for preparing for an examination. It is this fundamental quality of catering for the student that this new edition has above all attempted to preserve and even to increase. Conditions in 1961 — thirty years on even from Mr. Ziegler's edition — have necessitated such drastic changes that in content and other respects the book is very nearly a completely new one; yet the central idea of the work remains very much as it always has been.

The main changes may be summarised under four heads — emphasis, order, material and form. The factors making for these changes include especially the great advance in British scholarship on Roman law and in its literature in the past fifty years or so, with the works of Buckland, de Zulueta, Schulz and Jolowicz to name invidiously but four, all dead, of the internationally great scholars that have made contributions in English. This advance has necessarily heightened the standard to be expected of the student and has affected the methods of examining.

As regards emphasis there has been a conscious attempt to provide more material that should be helpful to the student in jurisprudence. Thus more space has been devoted to discussions of classification and of concepts (*e.g.* personality in respect of a slave especially, ownership and possession, prescription, obligation, contract, wrong, procedure), and it is hoped that the student who has done with his studies in Roman law itself may find some help in such portions of the text when he comes to analytical jurisprudence. At the same

time the rise of the study of comparative law has also had an effect on the treatment of the book. The editor has refrained from any systematic comparison but has presented material in many parts of the book in such a way as may encourage the student to draw his own tentative comparisons with English law.

Emphasis has also tended to be shifted away from the former rather close proximity to the Institutes of Justinian. In certain sections, *e.g.* especially on *damnum iniuria datum*, the accent is placed primarily on the steady development of the law and the importance of legal method and not just on recounting such rules as existed at one time or another. Growing interest and knowledge of the classical law has encouraged a greater concentration on that law as the finest achievement of Roman jurisprudence but without any abandonment of Justinian's law. The appearance of de Zulueta's works on Gaius and of Schulz's *Classical Roman Law* have given the student an excellent chance to get better acquainted with the classical law and the problems of scholarship involved in its study.

The order of the book has been basically maintained, although the section that formerly constituted the Introduction has now been styled Part One as an indication that it is just as much a part of the study of the subject and of the syllabus for examinations as the substantive law. Property, Succession and Obligations, the three divisions of the law of things, have been made into separate parts ranking as they do in extent and importance with Persons and Actions. Within the parts certain important reorganisations have been made where the former treatment seemed unsatisfactory. Thus marriage is discussed in full where it has its greatest legal importance, *viz.* in the context of the origins of *patria potestas*, and although such discussion becomes rather a lengthy excursus when divorce, *dos* and *manus* are all considered as well it still seems the least objectionable placing of it. Again, bondage has been relegated from *patria potestas* to the section on quasi-servile conditions, where it seems to have closer affinities. Methods of acquisition have been recast under the classification of original, derivative and prescriptive modes instead of the traditional *ius naturale* and *ius civile* headings because the threefold classification is the more important for jurisprudence generally,

if not for Roman law itself. Noxal liability and damage by animals have been transferred to a new home next to delict, their old location in the law of actions being justifiable only by the arrangement of the Institutes.

Yet logic and jurisprudence have not vanquished everywhere. Thus suretyship and agency (to which the topic of *actiones adiectitiae qualitatis* has been translated from actions) have not been given completely separate treatment despite strong temptation to do so. In the end it was felt that the student would learn more of legal development and would understand more of the idiosyncrasies of the topics if they remained as parts respectively of *stipulatio* and *mandatum*, from which the Romans themselves never really emancipated them. Finally, it may be said that many rearrangements I would have preferred in a book wholly my own I did not make because an editor should always have the burden of proof against him in respect of changes.

As far as the material of the book is concerned, there have been the greatest changes of all. In fact, some five-sixths, perhaps even more, of the book is completely new and of the remainder there have been everywhere revisions and expansions. It may be said that the changes 'grew under my hand'. At first I had intended to make drastic rewritings only very spasmodically, but in the process of revision I felt that in most cases the flow and ease of the treatment would be better if I wrote totally my own account than if I tried to expand even those portions which needed no substantial alterations in their statements. It is hoped that a greater coherence has been thus obtained and the general purpose of the book better served than if the whole work were a complete patchwork of the old text and my own. An added inducement to such a revolutionary approach has been the growing frequency of setting searching problem questions in examination papers. To enable the student confidently to face a paper with half or more of the questions in such a form, much more detail has to be incorporated into the text and that text presented in such a way as to explain and stimulate the technique of answering problems. An excellent example of an attempt to cater for the student in this way is to be found in the section on *accessio* in acquisition of ownership: the topic is so fruitful of tricky variations of problems that considerable space has

been devoted to it despite much of its unreality and relative unimportance.

Certain portions of this edition are new in every respect ; thus co-ownership for the first time receives special treatment, albeit very short, and representation in litigation becomes a new heading in the law of actions. Most important, however, is the inclusion of a short historical introduction to commence the book. It is useless to suppose that many students today have any real knowledge of Roman history and the relation of the law to it and so some such introduction, however short and general, is needed. To round off the picture and to satisfy the occasional examination question a sketch of the history of Roman law after Justinian until today has been added. The rest of Part One has been completely rearranged and no part of the existing text has been used in it. Part Two on Persons and Part Three on Property are also very largely completely new in text, while Part Four on Succession alone can claim to be more than half derived from the existing *Leage*. Succession is also the one part that has not been greatly increased in length : its elimination from the London syllabus appears to be paralleled by a tacit dropping of it in part or wholly by teachers in several other Universities. Whilst its general principles have great importance and interest its many technicalities can hardly be said to have the likelihood of exciting students.

Whilst a considerable part of the existing sections on contracts has been retained with severe amendments it is in the law of obligations that the greatest expansion has taken place with new portions on such general principles of contracts as exist and an almost entirely new treatment of delict. Obligations now form easily the largest single part in the book, and it is felt that this is amply justified because here lay probably the greatest Roman legal achievement and here is the amplest scope for profitable comparisons with English law. Finally, the law of actions has also been expanded in fact although the transference of topics such as noxal liability to the substantive portions and of the discussion on the rise of the *formula* and the *lex Aebutia* to the part on sources has resulted in its actual length not being greatly increased. In all, the book is not far short of being twice as long as it was.

In respect of form no attempt has been made to harmonise

the style of *Leage* with my own beyond the occasional elimination of what now seems archaic expression and what has been felt to be clumsy or misleading. On the other hand, I have ventured to exclude many of the more vague generalisations and also to eliminate the many instances where a Latin clause or sentence was stated alongside its translation: only where a surviving maxim is involved has the Latin been retained. The painful experience of reading candidates' examination attempts at writing even single Latin words has tended to curb any ambition to use any more terms than are necessary to identify institutions. Occasionally, however, one is rewarded by a touch of unconscious humour by the candidate. Thus *affectio maritalis* evokes cynical speculation when termed *materialis* or *martialis*, and one paper relieved this examiner's tedium by reference to a *formula in factum contracepta*. Subtlest of all these howlers, however, must surely be the *actio rerum amatorum*.

It will be observed that there are no footnotes at all in this edition. I felt that their use in the previous editions was in no way comprehensive and that in a purely students' work not only is there no need for them but also they form a constant source of distraction for the reader. It is hoped, of course, that those students that can will go as often as possible to the texts, if only in translation. For this purpose a short bibliography is contained in one of two appendices — the other being given over to examples of *formulae* in English. In harmony with the policy of deleting footnotes, cross-references have been kept to a minimum and have been made to appear in the body of the text. It is hoped that the fullness of the index will more than rectify any deficiencies so caused.

A number of the rules that will be found stated dogmatically are disputed by some writers or would be put with qualifications in a larger work. Fear of making the book too long must be my excuse. Also, it has been found impossible always to explain terms and institutions when first they appear in the work, but it is hoped that cross-references and the index will mitigate all but the most trivial difficulties so caused.

After having at oppressive length recounted and explained the far-reaching changes made in this edition I can turn to the simpler and more pleasant task of expressing indebtedness. In the first place I owe very much to the students I have taught

first at King's College, London, and then at Nottingham and to all I have examined including the nameless many that attempt the external London degree. Their difficulties and their indications of interest in various parts of the subject gave me the first impetus to undertake this edition. Secondly, it is hardly needful to say that my debt to all the leading works on Roman law, and especially to Buckland's *Textbook* with its invaluable assistance to finding the relevant texts, is large indeed.

To the publishers, especially to Mr. R. F. Allen and Mr. T. M. Farmiloe, I owe much — for their helpful co-operation at every turn and for their patience in the face of my many delays. To Professor Daube for the generous encouragement and interest that all Roman law teachers of this country know so well are due many thanks, tinged only with regret that I was not able to call on his help as I would have liked and as I know he would have wished; to Professor J. C. Smith and my other colleagues in the Nottingham University Law Department for much help, advice and interest, and especially to Mr. P. R. H. Webb who, with characteristic spontaneity and zest, read a considerable portion of the typescript, giving many very helpful comments and criticisms from the point of view of one who came utterly fresh to the subject, and also assisted manfully with so many of the mechanical tasks; to my brother, Mr. M. J. Prichard, of Caius College, Cambridge, who contributed many shrewd observations on those parts of the text he was able to scrutinise and thus enabled me to make several much-needed alterations in my first version. Finally, the largest debt is to my wife who, besides typing the whole of the work in admirable fashion despite frequent pressure of time, constantly offered constructive criticism and effectively deterred me from the wilder extravagances of my style.

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EXTRACT FROM PREFACE TO THE FIRST EDITION

THIS is an attempt to meet a want which I have felt in teaching Roman Law at Oxford, *viz.* some book which is content to give, as simply as possible, the subject-matter of the *Institutes* of Gaius and Justinian, following, in the main, the original order of treatment. It has proved impossible to keep strictly within these limits, and while I have sometimes judged it expedient to omit minor details of little practical importance, such as some of the degrees of cognatic relationship, I have also found it necessary, in order to make a coherent statement, to add information not contained in the *Institutes*, but derived from the *Digest*, *Code*, *Novels*, or from modern Civilians. In some cases, where the evidence is weak or controversy rages, I have ventured to state dogmatically what in a more pretentious work would require qualification.

R. W. LEAGE

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Lincoln's Inn

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* (*After Commodus most of the less important Emperors have been omitted.*)

PART ONE
HISTORY AND SOURCES
OF ROMAN LAW

PART ONE

HISTORY AND SOURCES OF ROMAN LAW

I

Outline of the History of Roman Law

TRADITIONALLY Rome was founded by Romulus in 753 B.C. and was ruled by kings until 510 B.C., when the seventh and last king, Tarquin, was expelled for his tyranny and a republic set up. Although the details of the story given by the Romans are mostly legendary and nearly all unreliable, the broad outline does seem correct. That there was a monarchy at a period within a century or so of the dates given by the Roman writers; that Rome was just one city-state, perhaps a dominant one, in that portion of central Italy known as Latium; that the monarchy became unpopular and was replaced by a republic whose constitution and magistracies show at once the previous existence of that monarchy and the fervent desire to prevent its reappearance—are all undeniable. It is also known that about then Rome was a community given over to agriculture of an area of a few square miles and periodically indulging in minor wars with other Latin and neighbouring communities. Internally, the major feature that affected later times was the prolonged dissension of two classes—the aristocratic patricians and the unprivileged plebeians—and much of Rome's early history is devoted to the struggles of the plebeians to achieve a greater parity with the patricians in political, economic and social life. This they obtained before the middle of the third century B.C., and with their victory, which roughly coincided with the end of the control of the priestly patrician body (known as the pontiffs) over the functioning of the law, one can fairly mark the end of the early period of Roman law.

That period is dominated by the passage of a famous law, the Twelve Tables, traditionally in 451-449 B.C.: it was the writing down of a number of laws, some customary, some perhaps introduced by it, for the purpose of clarifying the legal position of plebeians especially. It starts the development of Roman law.

By the end of this period Rome had achieved a paramouncy in Italy, most of the communities being now either subservient allies or strategically placed colonies of Romans. The next period opens with the First Punic War of the middle of the third century and it shows Rome beginning to realise its position as a great Mediterranean power. One by one it gradually defeats its various rivals in that area and annexes their territory — North Africa and Spain with the conquest of Carthage, Greece with that of Macedonia. By 100 B.C. whatever part of the Mediterranean seaboard was not Roman territory (*i.e.* mostly in the Eastern Mediterranean) was very much under Roman influence and by the last years of the Republic (after 50 B.C.) virtually all Europe south of the Rhine and the Danube, most of Asia Minor, Syria, Palestine, Egypt and North Africa were all Roman lands. In 88 B.C. after the Social War all Italy south of the Po received Roman citizenship. The rest of the Roman domains became governed as provinces by former Roman magistrates.

Meanwhile at home Rome was still primarily an aristocracy. At the end of the second century a period of revolution began with popular parties seeking legislative, and all too often military, defeats of the aristocracy, whose strength was in the old consultative body, the Senate, now composed mainly of ex-magistrates. This developed into a series of wars in which military leaders attached to one side or the other, but seeking either personal power or genuinely the settlement and peace of Rome (or both), seized control one after the other until the final victory of Julius Caesar in 46 B.C. His murder in 44 B.C. prevented the Empire's beginning with him and made way for the last wars of the Republic, which resulted in the emergence of his adopted son, Octavian, as victor and master of the Roman world in 31 B.C.

During this second half of the Republic the law had been vastly affected by the growth and expansion of Rome as a great trading power and by the consequent break-up of the

archaic formalism of the early law. In the last century of the Republic the two great law-making bodies of Rome, the praetors and the jurists, made the law a developed system that was capable of serving a huge empire. The period of the revolutions, then, may fairly be described as the beginning of the developed law.

In 27 B.C. Octavian ostensibly relinquished his dictatorial powers and 'restored' the Republic. This date, by the greatest paradox of history, is chosen as the start of the Empire. There must have been little change in constitution noticeable to Romans who had seen so many constitutional upheavals and dictatorships and who now probably noticed, with relief, only the establishment of peace. The forms of the Republic remained, only altered as far as was necessary to enable Augustus, as Octavian was now called, to keep the real power without much of the pomp. He came to be known as 'first citizen' (*Princeps*), and that title has customarily given its name to the first part of the Roman Empire — the Principate. Those Emperors who succeeded Augustus were not so ready to dispense with the pomp of office, but the *forms* of government were still republican, though the power was imperial. In the first century A.D. the Empire at times sustained a charmed life: there were bad emperors, mad, weak and, once or twice, strong and relatively good ones. There were murders and uprisings; there was much of decadence, much of cruelty. Yet the Empire survived and the Roman private law flourished. *Senatusconsulta* and imperial decrees took over the work of the praetor in legal development, working mainly through him, however. The jurists grew in stature and in influence, and the character of the great juristic work to come was settled now. There was no break in the development of the law with the coming of the Empire, but there was certainly a great added impetus. It may also be claimed that it was this period, along with the last century of the Republic, that saw the final separation of the private from the public law and that concentration of genius upon the private law, by the jurists especially, that made the private law the great achievement of Rome, not the criminal or other public law.

A.D. 96 saw the arrival of another period in Roman history. For the next eighty years or more Rome was well and strongly governed by five Emperors. Under the second, Trajan, Rome

reached its furthest limits — from the Caspian Sea and the River Tigris to the shores of Morocco and the River Clyde. And during the period the Empire — and the law — began to develop into a bureaucracy, a tendency that was to grow and grow. Under Hadrian and his two successors, Antoninus Pius and Marcus Aurelius, there came the first full flower of the Roman jurists, still a proud class but now definitely the servants of the Emperor. These reigns are often called the first classical period (A.D. 117–180). A brief period of poorer rule and less distinguished lawyers led to the second period (c. A.D. 193–250); a period in which the Severi were the foremost Emperors and in which lawyers now played the biggest role in the administration; a period of more troubled times and less good government than the first, yet one in which Roman law achieved its zenith by producing jurists who could compile and sum up all the work of their predecessors whilst still brilliantly developing and expanding it. These two periods then form the classical period, but it is perhaps wise to extend the first date back to A.D. 60 or even to the beginning of the Empire, for the development was continuous and it is difficult to draw sharp lines.

The Roman society of the late Republic and the early Empire had already attained its greatest achievements in literature and had also absorbed much of the lessons of Greek philosophy. In particular one school of thought, the Stoic, had suited admirably the traditions of Roman character, stern and ascetic, just and loyal, common-sense and unimaginative, active, with a flair for organisation. The growth in wealth had softened this tough character and introduced a considerable liberalism, so that the attitude of the legislators and the jurists of classical law was humanistic and moral. The work of the jurists, however, was not directly affected by philosophy to any great extent, the pattern of development being firmly settled on the practical solution of cases that arise, whilst the imperial legislation is interesting for its many attempts to use rules of private law for the furtherance of social policies.

After the death of Alexander Severus in A.D. 235 the classical period quickly faded away as the Empire was racked by fifty years of continuous revolutions and short reigns. As far as private law was concerned the creative jurists were gone for ever and legislation was non-existent. The rule of Dio-

clitian ended the upheavals and marked several great changes. Legislation began again, and compilations of such laws appeared. The bureaucracy still grew and the Empire was divided into two areas for administration, the beginning of the Western and Eastern Empires. The Emperor was now no longer just first citizen: the masquerade was finally done. He was in form and power master of the Empire, and thenceforth the Empire has been named the Dominate. The period of late law may be said to begin now. Diocletian's reign also marks the last effective resistance to the spread of Christianity. In the civil wars again ensuing after Diocletian's abdication in A.D. 305 Constantine the Great emerged as victor, and in the Edict of Milan of A.D. 313 Christianity became officially tolerated for the first time in the Empire. Christians were still a minority in the Empire and for the next seventy years or so there was a continuous struggle between three forces — paganism (backed up by Greek philosophy in the form of Neo-Platonism), orthodox Christianity and the heretical Arianism, with each force gaining ascendancy. Eventually Christianity was effectively imposed as the State's religion for the first time by Theodosius the Great. Meanwhile Constantine had set up a new capital in Byzantium which he renamed Constantinople. Under Christian influence he laid down a large number of laws that showed a marked change from previous policies — especially in respect of marriage, concubinage and divorce. After his death in 337 the Empire was again split into East and West, with occasional single rules at various times. The theory was that the whole Empire was ruled jointly, each emperor with his sphere of action, but after the death of Theodosius in 395 the Empire was permanently split in two, with the Western capital often away from Rome in Ravenna. The Emperors were all Christian now, but several of them were heretical, so that while legislation in both parts, but particularly the East, was often inspired by Christian views there was little coherency from one reign to the other.

The fifth century contained the final extinction of the Western Empire. Gradually hordes of barbarian and semi-barbarian invaders swept into Italy in one wave after another and the Emperors became little more than puppets of the barbarian chiefs, until in 476 Romulus Augustulus was summarily

deposed by the Herule chief, Odoacer. This date is traditionally taken as the end of the Western Empire.

The Eastern Empire, however, despite frequent religious and political dissensions, survived and consolidated its position in the Eastern Mediterranean. Although the Empire was still Roman, and with it the law, legislation naturally showed traces of Greek and other oriental influences: the law had now to deal with the social systems of the East; hence many Roman institutions became modified to meet the different conditions, especially in respect of commercial transactions. This is known as the Byzantine period of Roman law and it culminates in the reign of the great Justinian in the sixth century. He it was that set himself to accomplish a task dreamed of by predecessors but found beyond them — the codification of Roman law. This massive work in the early period of his reign summed up the Roman achievement, reverently incorporating in itself much of the juristic work of the classical period. It is with that compilation that Roman law is normally taken to have reached its consummation.

However, this was by no means the end of Roman law as a living system. Justinian himself issued much important legislation thereafter, and the Eastern Empire continued to exist, with a gradual lessening of its territory, until 1453 when the Turks took Constantinople. Although the law declined continually during those 900 years, it did continue as Roman law and at various times there were periods of not inconsiderable legal activity. In particular there appeared in the late ninth century the *Basilica*, largely containing in Greek the various works of Justinian as they still applied to the Empire. Even after 1453 the law was applied by the courts of the Orthodox Church, which retained a measure of independence under the Turks, and thus there remained in Greece a still continuing Roman law until a civil code based on Western systems (themselves based on Roman law) was adopted.

Nor in the West did Roman law die. Although Justinian's reconquest of Italy was short-lived, some at least of his texts remained, were studied, and still formed the basis of the law throughout the Dark Ages and thereafter up to the great revival of Roman law in the eleventh and twelfth centuries. In other parts of the Western Empire the barbarian kings,

especially the Goths, laid down laws for the Romans in their territories, laws that were crude reductions of imperial legislation up to the fifth century and epitomes of institutional works of classical jurists. Of these laws the most important, and one of the three that have come down to us, was the *lex Romana Visigothorum*, known as the Breviary of Alaric after the king that promulgated it in 506: the other two, of around the same date, were the *lex Romana Burgundiorum* and the *Edictum* of Theoderic (which applied to Romans and Goths alike). The Breviary survived for a long time as the basis of the law of Spain and of Southern France. Both these areas, like Italy, therefore retained the Roman character of their law, however much it was but a poor and diluted version of the great system. Elsewhere traces of Roman law survived, but such laws as existed were hardly systems and certainly not Roman systems.

In the eleventh century legal science suddenly reawoke along with much other learning in the universities of North Italy and, to a lesser extent, in France. Justinian's Digest, which contained the codification of the juristic writings and was the most important and impressive part of his compilations, was more or less rediscovered and lovingly reassembled by a series of great scholars. These scholars, particularly those at Bologna, began systematically to study the text, commenting on it by means of insertions in between the lines and then in the margins, insertions known as glosses. These Glossators continued their academic scrutiny of the texts for well over a century and contained in their numbers Irnerius, founder and probably greatest of the discipline; Placentinus; Vacarius, who came to England and lectured at Oxford; and Azo, whose works influenced Bracton very greatly in his thirteenth-century treatise on law. Eventually, around 1250, the commentaries on the Digest and other texts had grown to huge proportions and with the Great Gloss of Accursius the work was done.

At the same time as this work, and alongside it, there was an equally important development of the Canon law, which derived many of its rules and much of its method from Roman law. Thus it was that Roman law influenced even the early Common Law, especially in the person of Bracton. In England and in France there grew up the practice of resorting to the

Roman law as set out and explained by the Glossators where the customary law was defective — as it so often was. In France the influence on the customary law of the north was very great, especially in the law of obligations, whilst the Roman law of the south had come very much to life again with the revival of the eleventh and twelfth centuries. In England Roman law might well have obtained a greater hold after Bracton had it not been for the consolidation of the Common Law with its rigid formalism and its evolution of a practical legal education with the establishment of the Inns of Court, all in the fourteenth and fifteenth centuries.

Whilst the Common Law was just riding the wave another school of students of the Roman law had arisen in Europe, especially in Italy. These men, the Post-glossators or Bartolists (after Bartolus, their greatest figure), fulfilled the need of making the glossed Roman and Canon laws suitable for the practice of the law-courts. Naturally the glosses of their great predecessors had a great influence, for they had shown what parts of Roman law could apply in the mediaeval world and were fit for resurrection. Then, in the fifteenth century, the lands north of the Alps began to feel the full impact of the revival. In 1473 Burgundy established a court that would hear appeals from all its territories, and those included the Low Countries; in 1495 Maximilian, Holy Roman Emperor, established a similar court for all the German lands; and these courts were staffed primarily by men trained in the Roman and canonical systems. The influence on the mass of small and large local jurisdictions with greatly varying customary laws was far-reaching. The vast majority abandoned their own laws and 'received' the Roman or 'Civil' law.

The Reception coincided with a new wave of interest throughout Europe in all branches of study. In France men like Cujas, Doneau and Godefroy (adopting Latin names, Cujacius, Donellus and Gothofredus) developed a new approach to Roman law, studying the subject with the background of Rome and its history rather than of the Gloss. In Holland the Reception brought out a series of great lawyers, particularly Voet, and the Dutch learning led to the Reception in Scotland. Hostility and uneasy truces had made Scotland veer away from a development along lines of the Common Law and her students of the seventeenth century and later

went to study in Holland and came back ardent Romanists. Similarly, the Roman-Dutch system went with the Dutch to South Africa and to Ceylon, whilst French law went to Quebec and other territories since British.

By the eighteenth century it had become the practice for writers to produce works that were wholesale statements of the law in force, often in the form of articles. Such writings led to a movement for codification, a movement that came to fruition first in France with Napoleon's Code Civil of 1804, which owed much to the works of Pothier. In Germany the Romanists, led by Savigny, managed to withstand the efforts of those who wanted to revive the old Germanic laws and make them the basis for a new law, but in doing so they also held up the introduction of the German Code until 1900. Even so, the German nineteenth-century writers contributed some of the greatest glory to the scholarship of Roman law.

Today Roman law can be said to be a living part of relatively few systems of law. Most of the countries of Europe that retained or received it have now codified their systems and the law will primarily consist in those codes and their interpretation. One may have a knowledge of their laws and know no Roman law. That is not to say, however, that knowing the Roman system will not help to an appreciation of them and an understanding of the 'civilian' way of thought that lies behind the codes. For most of these countries their legal history is Roman law.

In English law, however, one must not exaggerate the influence that Roman law has had. Perhaps, at various times, that influence was considerable: traces of direct importation of it or of its progeny, the Canon law, can be found in different periods of our history; suspicions of other infiltrations are more than just plausible. Much of the feudal law on which the Common Law was built, much of Bracton and some at least of the law of Chancery and the Conciliar Courts are assuredly 'civil' in origin; and the jurisdiction of the Probate, Divorce and Admiralty Division was purely civil until the middle of last century. Moreover, English courts are not averse from going to Roman law solutions when unlooked for problems arise, as in the laws of treasure trove and of legacies, but the instances are extremely isolated. Yet all in all, it must

be admitted that the material imported into the Common Law has been for a long time so assimilated and so subjected to the Common lawyer's way of thinking that an English lawyer needs to know no Roman law in order to study and expound his own system today.

What then is the use of Roman law today in a country of the Common Law as distinct from a still largely civil system such as the Scottish? One solid claim may be confidently made for it: the theory of law, jurisprudence, has been built very much on the ideas, conceptions and classifications of Roman law and so a knowledge of them is important, indeed essential, for that field. Again, it may be fairly claimed that in order to obtain the benefits of a comparative study of European systems a knowledge of Roman law is far from being a handicap. Finally, however, the major argument is one that is hard to prove and rests largely on impressions from observation. Roman law has with Common Law a quality which no other developed system, at least of the Western world, possesses: it is a system that was built up empirically, and a study of the Roman texts will show that the lawyer of Rome was even more concerned with doing justice in the particular case, with making rules conform to the social policy in point and to the public opinion of the day than English law has been. To appreciate this one cannot just read a text-book containing a compendium of Roman law, one must go further and look at the texts — even in translation — on topics that can have meaning in modern life — *e.g.* on theft, on sale, on hire, on negligence. By seeing the problems that arose for the Roman lawyers and how they tackled them one can truly gain an appreciation of individual rules and solutions, deeper understanding of a practical legal technique and a humility of thought essential for legal progress.

II

Sources of Roman Law

The Romans were never very subtle in their classifications, even though they delighted in classifying. This can be observed immediately upon looking at the classification

Justinian makes of their sources of law — into *ius scriptum* (written law) and *ius non scriptum* (unwritten). To them the distinction was purely a matter of physical fact: if when a rule became law it appeared in writing, then the law was written. In contrast, modern usage confines the terminology to those sources in which the actual words used are 'law' and have to be interpreted as such, as in a statute; whilst in unwritten law the words merely express the import of the rule and have no force of their own whether they appear in writing or not, as with case law. The Roman distinction is purely factually descriptive, it implies nothing further to the lawyer: the English is one of substance with full legal consequences.

The Romans acknowledged only one unwritten source — custom. Their other sources, six in all, were all written and played a much greater part in the development of the law.

(A) Custom

The Romans themselves never analysed the concept, and various terms are found (e.g. *usus*, *mos*, *mores*, *consuetudo*) none of which maintain a fixed meaning. Whilst the force of custom was recognised, especially with regard to early law, there was little *direct* influence by it on the development of law, and in some of the relatively few texts where the idea occurs one detects more of lip service than of genuine interest. The basic principle is that law is made by popular consent and that what the people show as their wishes by their conduct should be law as much as what they enact by their votes. This theory is to be found even in the works of Justinian, long after autocracy had become firmly established. Perhaps it is just a conceit of his chief compiler, Tribonian, that involves also the view that imperial sovereignty originated and continued by virtue of a popular vote and acceptance. It does, however, lead to the view expressed that a statute of any sort can be abrogated by desuetude or contrary custom. A constitution of Constantine in the Code appears to contradict this view in the Digest by refusing custom the power to override reasonableness or statute. There seems to be no extant example of a custom certainly repealing a *lex* of any sort, and indeed a number of statutes may well have been brought in to get rid of archaic laws which some awkward litigant may

have resurrected. Justinian may have wished to guard against such incidents, but it is noticeable that he went to considerable trouble to repeal, and to point out as dead, institutions and rules long since disused.

The basis of Roman law, as of any law, was customary. Institutions such as the authority of a head of a family, monogamy and relationship, and most formal ceremonies arise before there is any law. As it was, the Roman law of marriage was throughout more regulated by custom than by specific laws. However, the majority of the customary rules became incorporated into other sources, especially, to begin with, into the Twelve Tables, with modifications and alterations in places. Then in the period of the greatest development the praetor's edict and the juristic writings greatly expanded the old customs and kept abreast with the ideas and needs of the community better even than the English precedent system. Truly then for Gaius in the second century A.D. custom must have seemed a source of the past. Where popular practices required a change in the law there were the *senatusconsulta* and the imperial constitutions to supplement the two main forms of law.

Custom can indirectly affect a law in many ways. Thus popular usage may raise implied terms in contracts and Roman law is not lacking in such examples. Many transactions became enforceable by actions in which the judge was instructed to take into account matters going to good faith (*bona fides*), and good faith is a concept primarily based on the normal way that people act. Again, custom regulates standards in respect of *iniuria*, wrongfulness: he who practises throwing javelins where it is the wont to do so does no wrong unless his act is intentional or reckless in the inflicting of damage.

Finally it must be noted that Rome did recognise local custom (*mos regionis*), though not really as distinct from the general. Even after citizenship had been given to nearly everyone in the Empire and one would have expected the indigenous laws of the former foreigners to be replaced, well-established customs were ordered to be enforced by provincial governors. In later law Greek trade practices and other customs had an especial influence on both legislation and the evolution of the law.

Rome never developed specific rules to identify a custom

— *e.g.* as to its age. It must have been left very much to the judge's discretion.

(B) *Lex*

The term may best be translated as 'statute'. Originally, and in its strict sense, it meant a proposal of the king (*rex*) or later of a curule magistrate (*i.e.* one elected by the *populus*, the people as a whole) which had been ratified by the vote of the *populus* meeting in a set form called the '*comitia*'. It was the consent of the people to some important act which the king or magistrate felt unable to do on his own authority, so that originally it was not necessarily legislative in the sense of changing or introducing laws. It would probably have covered various processes, *e.g.* the declaring of war and the making of treaties, the election of magistrates, the writing down and modification of customary law (especially the Twelve Tables), the specific exception in certain cases from the operation of the customary law (such as adoption by *adrogatio* and making of wills) and the death sentence on citizens.

The first evolution of such votes in the *comitia* into true legislation was certainly in the constitutional and political sphere and this process began very early in the Republic. Such early *leges*, however, do not seem to have been very hardy: certainly there are plenty of examples of laws having to be re-enacted several times, especially the legislation giving rights to the plebeians.

The machinery was always rather crude. The proposal was put and the *populus* had to vote 'aye' or 'nay' to the whole of it. There was no *legal* right of discussion, no power of proposing amendments. It was, however, customary for the magistrate to hold a *contio*, which was an informal meeting of the people which he addressed, allowing selected others also to speak for or against the proposal. The temper of the people at the *contio* might well induce the proposer to withdraw or amend his bill. There was, however, more to legislation than this and a proposing magistrate had to overcome several legal and *de facto* obstacles. In the first place, any proposal could be vetoed by a colleague of higher, or equal status (*e.g.* a *praetor* might have his bill vetoed by either *consul*, or one *consul* by the other — the power of veto was called *intercessio*) and in addition the tribunes, who held the

highest magistracy of the plebeians, obtained the power individually to veto any act of any magistrate or of the Senate during the Republic. This tribunician power was used in the later Republic by both aristocratic and popular parties to paralyse attempts at controversial legislation. The Senate, the body of the 'elders' consisting originally of leading patricians (*patres*) and later mainly of ex-magistrates and always predominantly conservative, had great influence on all legislation. Before any *lex* became binding it had to have the approval of a majority of the older, patrician section of the senate (*auctoritas patrum*), who acted as custodians of Roman religion for this purpose and could pronounce a bill as conflicting with omens and auspices. Legislation of 339 B.C. required the *auctoritas* to be given or refused before the bill was put to the *populus* and as time went on such *auctoritas* became a mere formality. More important was the powerful convention that no bill should be introduced without full discussion and approval by the whole Senate. Although this never became a rule of law it was rarely infringed and only then with great danger of violence and civil war, leading usually to the eventual assassination of the audacious magistrate.

Three forms of *comitia* evolved, all having in common that there was no simple majority vote by the people; instead the people were organised in groups (which might be parts of larger groups) and voted in them, the majority vote counting as the single vote for that group and those ultimate votes deciding the issue. The oldest *comitia* was the *curiata*. Its origin was ascribed to, and probably dated from, the early period of the kings. It appears never to have exercised truly legislative powers and survived as a merely formal body, meeting annually after the elections by another *comitia* to confer as a matter of form the legal powers (*imperium*) on the higher magistrates. The organisation was into thirty *curiae*, which may have been regional or tribal in origin, having definite religious rites and probably being a collection of *gentes* (or clans), and originally membership was probably purely patrician. When the *comitia curiata* was presided over by the chief religious dignitary (*pontifex maximus*, a post with strong political power) it was called *calata* and as such it had great importance in private law. In the *comitia calata* there took place the original form of will-making, a departure from

intestate inheritance that needed the sanction or at least the witness of the people; also *adrogatio*, the only process whereby an independent head of a family (*familia*) could be adopted into another *familia*. The form of will died out early in the Republic, being replaced by less cumbersome processes, but *adrogatio* retained this sole form until replaced by imperial rescript by Diocletian in A.D. 293. However, in historic times the *comitia* was no longer a meeting of the people, the *curiae* being represented by attendants (lictors) of the magistrate, who merely confirmed the decision of the pontiffs (priests) after their investigation of the proposal.

The principal *comitia* was the *centuriata*, organised on the basis of groups known as centuries. The composition of these groups and their arrangements varied at times during the Republic as a result of legislation brought in by each party as it secured temporary power. The centuries were based on a military and timocratic principle, the richer citizens being those that could afford the expensive armour of the first-class foot-soldier and therefore took the brunt of ancient battle. This original theory of those who did the most having the largest say outlived its justification and provided an assembly wherein the richest classes (along with the privileged *equites*, originally the army's cavalry), though in a small minority, could outvote the poorer masses. It was always an unwieldy body and in the late Republic was convened only for the most important decisions. These included the election of the superior magistrates, *i.e.* those with *imperium* (consuls and praetors) and the specially privileged *censor*, and the hearing of an appeal by a citizen against the death sentence (*provocatio*).

Most legislation and routine work, including elections of lesser magistrates (e.g. *aediles* and *quaestores*), was probably done by the third *comitia*, the *tributa*. Like the *centuriata* it probably originated early in the Republic though both were ascribed to the later regal period. It was organised on a fresh tribal basis which ultimately settled at 35 tribes. From 312 B.C. it included citizens who had no landed property. This was the first extension of franchise to such persons and, although the organisation was such that their votes would not weigh much, it was a remarkably early relaxation of a property franchise — especially in comparison with English

history. Little is known of this *comitia* for certain and until the nineteenth century it was confused with the plebeian assembly, the *concilium plebis*, which was also organised on a tribal system and must have greatly resembled it in later times.

(C) *Plebiscitum*

One of the biggest problems of Roman history is the origin of the division into patricians and plebeians that overshadowed the whole of the internal history of early Rome. Certain it is that the patricians possessed great privileges and plebeians severe disabilities and the patricians were always probably only a minority. Various theories of origin have been advanced — that the plebeians were the original people conquered by a strong band of invaders ; that the patricians were indigenous and the plebeians people of neighbouring communities who came to Rome as it grew in size and prosperity or had been conquered by the patricians and brought to Rome ; that the plebeians were ex-slaves (most unlikely) or dependent clients of the patricians. However, it seems safest just to assume that the patricians formed the original 'nobility' with most of the land (and with it most of the wealth of an early community) concentrated in their hands. Not only did the patricians have a social and economic dominance, they may originally alone have had political rights, holding magistracies and voting, and certainly they continued to monopolise the magistracies for many years. In addition they had a monopoly of the priesthood, religion in Rome always maintaining a great control over politics, and through the priesthood they held mastery over the application of the law. One by one the plebeians managed to abolish their important disabilities, but it took two or three centuries with many setbacks which instilled into them a determination to provide full legal safeguards for their hard-won gains. Their chief weapon was the secession : when the patricians refused to make concessions, the plebeians just left and went to live on near-by hills until the patricians gave way. The sanction was probably primarily economic, with the plebeians perhaps providing most of the manual work and their secession resembling in its way a general strike ; it might, however, have had an even greater sanction in a military sphere, the withdrawal leaving Rome

open to attack, which at the same time would have made it a last resort. Added to this weapon was the great increase in the proportion of plebeians over patricians whose birth-rate fell and who lost many of their numbers in wars. The patrician strength was probably only held by the system of clientage whereby many of the poorer plebeians were their well-treated dependants and thus supported them.

In their secessions the plebeians formed their own assembly, the *concilium plebis*, and elected their own magistrates, the tribunes and plebeian aediles, practices they continued on their return to Rome. Among their grievances were: the unequal distribution of public land taken by conquest; the prohibition of intermarriage between the two classes or *ordines*; the stringency of the law of debt whereby debtors, invariably plebeians, could be reduced to bondage and even slavery; the at first legal, later practical, exclusion of plebeians from magistracies of the *populus* (curule magistracies); and the uncertainty of the law and the secrecy of its procedure (though this is denied by some). In the course of achieving these ends they also obtained the veto for the tribune and the legal right for him to intervene at any time to protect a wrongly treated plebeian, as well as a sacrosanctity for his person backed by the criminal law. However, in all the long struggle and the many *leges* passed, two events stand out. The first was the Twelve Tables traditionally dated around 450 B.C. and certainly passed by a community the vast majority of whom were concerned with pasture and agriculture. It appears to have consisted of the main customary rules of substantive law that were peculiar to Rome, along with modifications and innovations (*e.g.* that three sales of a son into bondage should break a father's power over him), and a main outline of procedure. The plebeians now had an indisputable statement of the law. The second event marks the virtual end of the struggle, the *lex Hortensia* of 287 B.C. This statute gave full legal effect to the resolutions of the plebeian assembly (*plebis scita*) so that they now had the force of law. The Roman historians allege that previous statutes had been passed to the same effect, but probably either they had a lesser effect (*e.g.* making the *scita* law vis-à-vis the plebeians alone, or making them law with the consent of the Senate) or else they are apocryphal.

The provision of the *lex Hortensia* was not as great a

tyranny of the majority as it might sound. The patricians were by now extremely small in numbers and their interests would be fully protected by the Senate before which it became as strong a convention to present bills for *plebiscita* as for *leges*. Moreover, the votes of all the assemblies were becoming more and more dominated by the urban proletariat with the result that by the last century of the Republic legislation depended upon which party could sway — or bribe — the mob.

After the *lex Hortensia*, *plebiscita* soon became more and more assimilated to *leges* and even came to be called such (e.g. the *lex Aquilia* on damage to property). The *concilium* was summoned by any of the ten tribunes, whilst the popular assemblies were summoned by a curule magistrate with *imperium*: which form was actually employed would therefore depend primarily on which magistrate wished to initiate the legislation. It seems that *plebiscita* became the normal form, perhaps because of greater tribunician activity.

It was usual for a statute of any sort to lay down a rule and then annex a sanction. Some statutes, however, were not *perfectae* in this sense: some were *minus quam perfectae* (e.g. *lex Furia testamentaria*, laying down a severe penalty for extravagant legacies without invalidating them); others were *imperfectae* (e.g. *lex Cincia*, forbidding gifts of more than a fixed amount, yet not invalidating or penalising them). It was left for magistrates to give indirect effect to such laws where needed.

Despite the hollow mockery of democracy in the mob vote of the late Republic, Augustus retained the assemblies in his endeavour to keep the forms, at least, of the Republic alive and he used *leges* to pass a great deal of legislation affecting, as well as the criminal law, considerable portions of the private law, especially on marriage, succession and slavery. He even allowed some of his bills to be voted down. But the signs of decay remained, and to him the assemblies gave up their powers of declaring war and making treaties. His successor, Tiberius, used the assemblies less and less, transferring magisterial elections to the Senate. Occasional *leges* were passed during the rest of the first century A.D. but none are found after A.D. 97.

Lex and *plebiscitum* played comparatively little part in private law after the Twelve Tables. Most *leges* that do affect that law were passed as social or political measures rather than

out of concern for individual law reform. Perhaps the most important statutes on private law were ironically those of Augustus.

Statutes took their names from the magistrate or magistrates that proposed them.

(D) *Magistratum Edicta*

After the expulsion of the kings their functions were broken up. Thus the religious ones were conferred mainly on the *pontifex maximus* (who held office for life and was always a patrician until 253 B.C. despite a *lex Ogulnia* of 300 B.C. which first opened the post to plebeians), except for ceremonial functions given to a *rex sacrorum*. The civic powers were given to two magistrates elected annually and known first as praetors, later as consuls. In the fifth century it was frequent for a number of military tribunes (usually six, including plebeians occasionally) to be elected instead of the consuls, and in times of emergency a consul might appoint a *dictator* to act with almost unlimited power for six months. If both consuls died before the survivor had held an election, the senate appointed a temporary *interrex*.

By 367 B.C. the consuls had become overburdened with a mass of work and at the same time the monopoly of their office by patricians was long overdue for destruction. The *leges Liciniae Sextiae* ordained that the consulship should not only be open to plebeians but that one of them had always to be a plebeian whatever the other; they also set up a new magistracy with *imperium*, the praetorship (which may at first have been confined to patricians, but was soon open to all). Technically the new magistrate had, like the consul, no limits to his *imperium* — other than the veto of the superior magistrate. However, he was appointed for the purpose of relieving the consuls of the task of controlling the inauguration of private litigation and, whilst he did occasionally exercise military command and other functions, he became the central figure in private law. The *leges* also established two aedileships to supplement the already existing two plebeian ones so that the four aediles formed a 'college' for the policing and hygiene of Rome itself: the two curule ones had especial control of the forum and that control had a great effect on

the laws of sale and damage by animals. Meanwhile, in the fifth century two patrician magistracies (after a century open to plebeians also, with one reserved for them as with the consulship) had been set up — the censorships. Whilst not having *imperium* they had the function of compiling the five-yearly *census* (with its control of voting lists) and selection of senators as well as considerable financial responsibilities. The consuls' delegates, the quaestors, became minor magistrates exercising many of the consuls' functions, especially in finance and the conduct of the criminal law.

Of all these magistracies it was, however, the praetorship that was by far the most important in its influence on the law. Indeed it was that office that enabled the development of Roman law into a great system. Two main factors fitted the praetor for that task of development: (i) his position in the peculiar Roman system of trial and (ii) his right, along with other magistrates, to issue edicts publishing his policies and programmes during his year in office (*ius edicendi*).

In Roman civil proceedings up till the end of the classical period (c. A.D. 250) there were normally two distinct parts — proceedings *in iure* and those *apud iudicem*. The function of the first part was the settlement of the issues involved by the parties before the praetor and, where necessary with his help, incorporating those issues clearly defined into the appropriate 'form of action' (to use a loose term). This done, the *iudex* (judge — a layman chosen by the parties from a panel (*album*) of senators and later of well-to-do *equites* as well) or *recuperatores* (several laymen acting in certain set cases) tried the issue as so put and gave judgment. For the major part of the Republic the praetor could exercise little influence on the law through his control of the proceedings *in iure* because of the *legis actio* system of procedure then alone in force. There were eventually five *legis actiones* (statutory proceedings), but only three were modes of trial and into their rigid and stereotyped pattern of words issues in all civil actions had to be reduced (*post*, p. 435). There was no room for development here.

The occasion for escape from this rigidity and formalism came with the expansion of Rome and the recognition that the large number of *peregrini* (foreigners) that came regularly to the city, especially for trade, would have to receive some

systematic attention as to their litigation. Previously the difficulty had been met piecemeal by the granting of privileges to share to some extent in the *ius civile* (the law applying and available to citizens alone) and by the making of treaties with other nations and cities containing specific machinery for settlement of disputes involving their citizens. At the end of the First Punic War in 241 B.C. Rome was a 'great power' in the Mediterranean world, having its first province, Sicily, outside Italy. In 242 B.C. a second praetorship was instituted to deal with the disputes of these peregrines, perhaps only those between themselves, perhaps also those they had with Romans. Very little is known of the jurisdiction of this 'peregrine' praetor or of his methods of proceeding or of the law that he administered. Occasionally his office was held by the original praetor, now known as 'urban' praetor, in addition to his own, but usually there were two separate magistrates.

It is presumed that the new praetor, unable to use the civil *legis actio* procedure because the peregrines had no *commercium* (i.e. the capacity to take part in *ius civile* ceremonies), developed a simpler and more flexible procedure, still employing the division of '*in iure*' and '*apud iudicem*' but perhaps modelled on the systems of neighbouring communities, particularly the Greek cities of southern Italy and Sicily. This new system involved the issue's being written down by the parties and the praetor, and this writing (*formula*) was so constructed as to make it clear with what matters the judge was concerned. So far, the only distinctions from the *legis actio* would be the writing instead of the oral recitation of set forms and the inability to use those particular forms. As the main litigants before the praetor would be merchants and traders their needs would be primarily catered for, and their needs are always for speed in decision and simplicity in proceedings. The *formula* would then be free from elaborate ceremonial, short in form and clear in issue. Much would depend on the way in which the *recuperatores* (for a single *iudex* never seems to have tried purely peregrine cases) would come to their decision. There would be no law to point to in many of the cases — *ius civile* was unavailable, and not likely to be favoured by the litigants in any event, and often the traders would be of different states or their own state law would be uncertain. The decisions might then often depend upon the general

customs of traders and upon common-sense solutions. Where strict rights are not in existence or not exactly provable, more discretion is given to the judge. The praetor would have the *formula* framed so that the judges would be able to decide the issue as satisfactorily as possible. Experience of cases might lead him to put the issue in such a way that if the facts were so found by the judges they had no discretion. In other less simple cases, involving perhaps a complexity of dealings, it would be better to specify the transaction in question and leave the judges to sort out the rights and wrongs according to the standards of conduct to be expected in the field in which the litigants practised. In addition some of the more useful and the less 'sacred' institutions and rules of the *ius civile* might be adapted and enforced by the *formula*. In some cases even, the praetor might become so bold as to refuse any *formula* at all, whatever the technical basis for the claim made. All, of course, is conjecture, but it seems very probable that it was in his 'court' that the *formula* first came to Rome and that in his court there evolved, empirically, almost unconsciously, a body of simple law, partly derived from the less formal parts of *ius civile*, partly from mercantile custom, which was going to revolutionise that most important part of Roman law, obligations.

That the *formula* superseded the *legis actio* in the court of the urban praetor in the last century or century and a half of the Republic is certain: how and exactly when it occurred are just as uncertain. A *lex Aebutia* and two *leges Iuliae* are reported to have abolished the *legis actio* system in all but two special and relatively unimportant types of case. The first statute's date is quite unknown and much disputed, but majority opinion places it in the third quarter of the second century (150-125 B.C.); that of the other two is less problematical, they seem to be Augustan legislation of 17 B.C. or thereabouts. The relation of the first to the others is one of the problems. It is, however, generally agreed that the first *lex* made the *formula* available either for all civil litigation or just for such as had previously been conducted solely by *legis actio*, while the others made it the only procedure available, doing away with the option of the *legis actio*.

The major question relates to the *lex Aebutia*: was it a pure innovation working a procedural revolution or could and

did the urban praetor use the *formula* beforehand? If the common opinion as to its date is correct, it seems highly improbable that the *lex* could have been completely innovating: the hundred years or less that was still to run was far too short a span for all the many great praetorian developments known to have been complete by the end of the Republic. Much of the law of contract, *e.g.* sale and hire, depended upon the existence of the *formula* for enforcement and those bodies of law seem most likely to have arisen in the law for citizens in the third century B.C. — not nearly as late as the end of the second. It therefore seems probable that the *formula* was in use before the *lex*. If so, there are two possibilities: either it related to causes of action not enforceable by *legis actio* or it was used for all types of case. On the first hypothesis one could suggest that those *formulae* which became classed as *bonae fidei* (and perhaps those as *in factum*) were the likely ones: this would especially include the truly commercial contracts. Here the inference is clear: these would be the very causes that the *praetor peregrinus* would wholly — or at least mostly — be concerned with. Disputes between peregrines and citizens are more likely to have been tried under the urban praetor's jurisdiction because there is no evidence of such cases before his 'peregrine' brother and all the cases wherein the dispute is based on a civil law concept (*e.g.* ownership of the *res* damaged to found a claim under the *lex Aquilia*) require a fiction of citizenship in the peregrine party and point to the urban court. This would mean that the urban praetor would have common sense and public opinion on his side if he allowed actions between *civis* and peregrine where they were available between peregrines. Thence this step to actions between *civis* and *civis* was a small one, and a natural one if *cives* were learning the less cumbersome and more speedy ways of the trading nations. The new actions would constitute, then, no break with the civil law, no deviation from its procedure: they would form a new field entirely. The *lex Aebutia* might merely have enabled the now tried and popular *formula* to be employed instead of the *legis actio*, perhaps at the option of the plaintiff, perhaps with the consent of both, perhaps in the discretion of the praetor.

The second hypothesis does not conflict with the first, merely supplements it. Perhaps the speed and ease of the

procedure before the peregrine praetor began to appeal to citizens and so accordingly in increasing numbers they approached the praetor for its use, and he, relying on the consent of both, allowed the usage — much as many disputants will submit to arbitration today rather than endure what they consider the defects of ordinary litigation (or as the simplified procedure of the Commercial Court has been built up purely on the consents of both parties). Thus civil law claims apt for *legis actio* might be put into a *formula* as well as those mentioned in the first hypothesis. Then suddenly, perhaps, a litigant, after submitting to a *formula* and losing, claimed he was not bound to it, rightly contesting that only a *legis actio* had such an effect. This would make the *lex* not a great innovating statute but just a minor act to make strict law conform with general practice (cp. *Ashford v. Thornton* and the abolition of trial by battle in English law). Such an explanation would also give a reason why the *lex* is not reported by the historians of the age as it most probably would have been had it made a fundamental change in the law.

Whatever the effect and history of the *lex* it is certain that at some time in the last two hundred years of the Republic the urban praetor had in the *formula* the means he needed to make radical changes and innovations in the law. However, the immediate effect must not be exaggerated. The vast majority of cases that would be decided under the *formula* would for many years be cases which previously had been tried by *legis actio* or had been 'adopted' into the jurisdiction from the peregrine praetor. Thus some of the names were simply transferred from *legis actio*, e.g. *vindicatio* and *condictio*. The great advantage, however, of the *formula* was its flexibility: by simple manipulation of the various clauses, actions could be extended or narrowed, the judge's discretion increased or lessened.

The *formula* of itself could not effect the necessary changes. Legislation is done by a single act: development is a matter of a process taking a long time. A new *formula* or a variation of an existing one would not add to or detract from the rights and duties under the law; but a sufficiently great number of grants or variations would found the notion that there was a right to the *formula* in the particular circumstances. Once a right to an action is established lawyers are not long in recog-

nising a substantive right that the action protects. But this is a process of years, not weeks or months, and under the Republican constitution no magistrate could hold office for more than a year. While this principle was occasionally broken in the later period during revolutions, there is no evidence of any praetor who made great innovations and achieved reelection long enough to change the law himself. The tenure of the praetorship was too short for there to be such a personal equity as the great English Chancellors achieved. Some instrument of coherency was therefore needed, one that would withstand days of violence and revolution, and political changes in the office-holders themselves. The instrument was the edict.

As already stated the praetor possessed the *ius edicendi*. With this power he would post up in the forum an *album* (a white wax tablet or collection of tablets) on which would be the statement of the policies he intended to follow in the exercise of his powers — particularly those of jurisdiction, but also various police powers. These statements might be made on any occasion during the year of office when events demanded and the *edictum* would be called *repentinum* (literally 'sudden'), but by far the most important edict was the one which he published at the beginning of his term of office and by which he proposed to act during that term, called *perpetuum* (i.e. lasting through the year). This latter edict would gradually come to consist more and more of the provisions of the previous praetor's edict, until in the very last years of the Republic it must have been common for an edict to be reissued by a succeeding praetor without any change in it. The part of the edict that was taken over by the successor was called *edictum tralatitium*, that originated by him, *novum*. Here was the perfect medium for empirical change and development. The praetor was not usually a skilled lawyer (a few, e.g. Aquilius Gallus, were great jurists), although he would as a Roman aristocrat have a considerable lay knowledge of the law, and he would rely very much on the advice of jurists whom he selected as his consultants. Presumably these jurists, who as a body became less and less politically active in the last fifty years of the Republic, would often form the *consilium* (panel) for successive praetors and thus give continuity to the development. Added to this is the important factor that a praetor would in most cases be aiming at the consulship in the years

that followed and would be extremely sensitive to public opinion. The result would therefore be that in making his edict the praetor would incorporate all that was tried and appreciated by the people in preceding edicts and add only where he felt a new provision was needed and acceptable. If the innovation proved inconvenient or unpopular, it could be dropped in the next edict without much harm. The edict would come to consist of a number of rubrics (headings in red letters) under which the praetor would specify a number of circumstances and then declare what he would do in those circumstances: *e.g.* 'I will grant an action', 'I will give a defence', 'I forbid . . .', 'I will investigate', 'let the defendant restore . . .'. If a *formula* was in point and granted, its form would be set out at the end of that portion of the edict.

At first it was only convention, sanctioned by public opinion, that induced a magistrate to fulfil and consistently to follow his edict. In the revolutionary period there were flagrant instances of magistrates departing from their edict to favour individuals, particularly in the provinces where the governor's edict was as important as the praetor's in Rome and which, being away from the gaze of the city, were regarded as 'fair game' for exploitation by many unscrupulous officials. In 67 B.C. a *lex Cornelia* was passed forbidding any departure from the edict as promulgated (though, of course, nothing prevented the issue of an *edictum repentinum* if a new situation arose). This strengthened the edict, which continued to be expanded by praetors for the rest of the Republic. However, with the coming of the Empire his freedom of action gradually became straitened. Whereas it had been his decision in the majority of cases that effected the change, now the Senate under imperial 'guidance' took an increasingly great part in the control of jurisdiction, regularly using its power of giving magistrates directions where previously they had been little concerned with the praetor because of the non-political nature of his private law work. The Emperors also, advised now by the best lawyers of the day, began to issue directives and thus the edict became sterile as a weapon of reform by the praetor. It is noteworthy that it was under Hadrian, in whose reign *senatusconsulta* first clearly became direct legislation instead of directions to magistrates controlling their discretion, that the edict was consolidated by the Emperor's chief legal adviser,

Salvius Iulianus (known as Julian to modern writers and perhaps the greatest of all Roman jurists). Along with it were consolidated the edicts of the peregrine praetor (very much the same probably in its commercial sphere as the urban edict) and of the curule aediles. It is uncertain whether the edicts of the provincial governors were also consolidated, but in any case they must have been firmly under imperial control. Henceforth specific legal changes could only be made by the Senate and the Emperor.

The large body of law which the praetor brought into existence by indirect procedural methods was called *ius praetorium* (the most important part by far of the *ius honorarium*, the law from the *honores* or offices, with which it is often equated) and was truly as much a system of Equity as that of the English Chancery. Any analogy is extremely loose, but two great resemblances are the gloss-like character of the equity, inexplicable except in relation to the rules of the defective civil and common laws, and the very effective powers of enforcement and execution that both possessed and developed. Beyond that, however, the praetor seems to have the major advantage: his was not a separate jurisdiction; he had control of the whole apparatus of private law so that as long as he conformed to public opinion and juristic advice he would receive no strong opposition in his developments; moreover, he could develop the whole range of that law, not just the property part of it like the English Chancellor.

The praetor's work was summed up as the introduction of rules and institutions for the aiding, the supplementing and the correction of the civil law (*adiuvandi, supplendi, corrigendi iuris civilis gratia*) — a classification adopted for the English equity. Under the first head was not just the framing of a *formula* in place of a *legis actio*, but the giving of another remedy, usually speedier, more effective and easier to obtain. Thus the heir entitled at civil law by will or on intestacy could obtain the inheritance by his *ius civile* remedy, the *hereditatis petitio*, but this was cumbersome, not blessed with attractive powers of execution, and needed considerable proof of title. The praetor, however, on evidence that satisfied him, gave to such an heir the very effective remedies of *bonorum possessio* (*post*, p. 299). Again, he would grant defences (*exceptiones*) against claims that had been forbidden or penalised

by *leges* (e.g. on excessive gifts under *lex Cincia*). Under the second head he would supplement the civil law by granting remedies to meet new situations uncatered for by that law. In particular he would extend civil law actions by fictions and other variations in *formulae* (*actiones utiles*) and grant new remedies on particular facts (*actiones in factum*). Also under this head come many of the non-formulary remedies that he exercised in his administrative 'police', rather than judicial, function (e.g. interdicts, *post*, p. 460). In the law of intestate succession he introduced claims for *bonorum possessio* in favour of persons not entitled at civil law (e.g. *cognati* and spouses, *post*, p. 294) without ousting anyone so entitled, merely giving them the remedies if no one was so entitled. The third head was in many ways the smallest: a praetor would have to be sure of strong popular support before he neutralised the civil law. In some circumstances he would refuse a remedy to one strictly entitled (*denegatio actionis*), in others grant one to another not entitled at all against such a person. Again from the law of succession, the praetor would grant *bonorum possessio* of a father's estate to a son emancipated from his father's family (and at *ius civile* rightless therein) in priority to persons civilly entitled.

It is fair to say that most subsequent legal development, by interpretation of the jurists or by legislation of the Emperors, followed the pattern and built upon the work of the praetor. To him was owed the great empirical nature of Roman law.

(E) *Senatusconsulta*

The Senate was a body of elders similar to that found in any community. At first it consisted solely of patricians, perhaps heads of the leading families. Under the Republic the consuls had power to nominate to it, but later the censors took over the task and after the *lex Ovinia* (c. 312 B.C.) it became customary for all senior magistrates (aediles and above, later tribunes and finally, under Sulla, quaestors) to be admitted to the Senate unless they were in some way disgraced. By the end of the Republic the original 300 had grown to over 600 and, while there were now few patricians left, the Senate remained primarily an aristocratic body and usually a bulwark of conservatism. Constitutionally it was an

impressive advisory body which acquired considerable executive powers. It had *no* legislative powers under the Republic. Its dignity, however, is evidenced by the official name of the State — 'The Senate and the Roman People' (S.P.Q.R.) — and the Senate gradually took the major part in negotiating treaties which the people merely ratified. The Senate also had by convention a large control over all the magistrates, consuls especially, and few would dare to disregard its directives (*consulta*). The senate had great influence and powers in respect of finance and religion and the conduct of foreign affairs and even assumed the right to dispense from *leges*. A particularly impressive power which it claimed was that of conferring extreme powers, including execution of citizens, upon the consuls in an emergency (*senatusconsultum ultimum*). Its legality was always questioned and the consuls who acted upon it were never safe from subsequent popular measures. In addition the Senate obtained by custom the power to assign *provinciae* (spheres of action, particularly governorship of foreign territories) to retiring magistrates.

Under the Empire the Senate became completely subservient to the Emperor, at the same time acquiring more and more powers. As the assemblies died out the powers of the Senate increased. Under Tiberius the Senate was given the task of electing the magistrates and the Emperors made of the families of senators a rich nobility — the senatorial class, at the same time keeping complete control over the membership. For the first century of the Empire the apparent constitutional position of the Senate changed little. However, it exercised even greater control of the various magistrates, who increasingly became functionaries with little discretion, and in particular it gave many more directions to the praetors, these *senatusconsulta* making great additions to the *ius honorarium*. They operated thus indirectly, using praetorian weapons in the main, e.g. *exceptiones* and *bonorum possessio*. Whilst the Senate still discussed with varying amounts of freedom all but truly political issues, there was no doubt that the Emperor had real control and most of this indirect legislation derived from him and his legal advisers.

With the second century A.D., however, a change is noticeable. By Hadrian's reign at the latest, the *senatusconsultum* was fully recognised as having the force of *lex* and changing

the *ius civile*, about the same period that the Emperor also clearly possesses full legislative power. Ironically this accretion of power to the Senate really marks the beginning of its final decline. Though there are many important *consulta* of the second century, they are more and more framed by the Emperor's *consilium* and submitted to the Senate merely for ratification with little or no discussion, certainly none that could have any effect. Whereas the Emperor as *princeps Senatus* had been used to address the senators and to detail his proposals in his speech, he now began to send the *oratio* as compiled by his jurists to the Senate. By A.D. 200 the *oratio principis* was regarded as making the law itself. The last *consultum* with legislative effect was under the Emperor Probus and it was purely a formal act. After 282 the Senate became more and more a distinguished town council with authority still in the city, which was soon to cease to be the regular capital of the Empire.

(F) *Principum Placita*

In the classical period it was firmly established that what the Emperor ordained had the force of *lex*. The normal justification for this was the *lex de imperio* that was customarily passed at the beginning of the reign of the early Emperors. Even Justinian after centuries of autocracy placed the imperial authority on the basis of the popular vote. However, the *lex* in question does not seem to have conferred direct legislative powers: certainly Augustus with his preference for behind the scenes manipulation of republican forms would not have countenanced such a conferment on himself. However, wide powers such as those of war and peace were conferred upon him as well as perpetual tribunician *sacrosanctitas* and perpetual proconsular power. There was also a power 'to do all things that he considered necessary for the state's welfare'. He also took charge of the religion of the country. By the second century Emperors were deified upon death.

Whether the power was indeed conferred by *lex* or just grew by custom as the Emperor's true power became increasingly obvious, there was certainly power in the *princeps* to make *ius civile* by the time of Hadrian. However, it may well have been much earlier: Claudius apparently changed the

law of marriage by a constitution of his own so that he should be able to marry his niece, Agrippina, even though he might easily have had a *lex* or *senatusconsultum* carried. This looks uncommonly like legislation on a matter involving incest ; and Claudius was not a man impatient of formalities, but the most ardent conserver of forms and traditions among the Emperors.

The original forms of imperial legislation reflect the character of supreme magistrate, and the imperial constitutions of the first two centuries or so can be grouped into certain forms, even though it had become settled that *placita* were law and this would suggest that the form was really immaterial : all that was needed was a clear intimation of imperial intention to change the law. The original forms may be briefly set out.

1. *Edicta*

In common with all magistrates the Emperor had the *ius edicendi*. Any edict of his would, of course, be more powerful than that of any other magistrate ever, and so what was a statement of policy in respect of exercise of powers would very soon appear legislative in him who had supreme powers. The edict would obviously last till revocation by the issuer or till his death. However, it became settled very soon that an imperial edict intended to endure should survive the Emperor and only be repealed by subsequent enactment. The form of an edict is reasonably easy to detect as the Emperor is represented as making a continuous statement (*dicit* — present tense). Edicts date from the time of Augustus and deal with an unlimited range of matters. Perhaps the most famous today is the *Constitutio Antoniniana*, whereby in A.D. 212 Caracalla gave citizenship to nearly every inhabitant of the Empire.

2. *Decreta*

In general, in Rome judicial decisions affected only the parties to the suit. There was never any system of deducing principles from decisions or any precedents as in the Common Law. Moreover, in the Republic there never was any system of appeals and *iudices* gave judgment with law and fact hardly distinguished, albeit with the aid of jurists. Under the Empire appeals in civil suits do appear to have been introduced, even

in the formulary procedure, although it seems that a regular appellate system was only developed in the final system of procedure, the *cognitio extraordinaria*, when a lay judge no longer decided cases. In both systems, however, it was not uncommon for an appeal to be made to the Emperor and in some cases he even heard trials at first instance. Often, of course, the appeal might involve no real legal point, but where such an issue arose the Emperor might, after obtaining the advice of his *consilium*, state a new principle to be generally observed and apply it himself in the case. Such a decision (*decretum*) was duly recorded and kept in the archives, often with a summary of the arguments made in the case. The form differs from an edict, a past tense being used (*dixit* — perfect). As time went on the Emperor heard less cases, appeals normally being made to high officials in the late Empire and imperial authority more often sought by rescripts (*infra*).

3. *Mandata*

These were instructions sent by the Emperor to officials without any prior solicitation for imperial action. They were often made to provincial governors and mostly concerned military, fiscal or administrative policy, rarely law. Legal points were more likely to be made in either the more general *edicta* or the more narrow rescripts. However, important *mandata* are found in the law even though Roman writers do not count *mandata* amongst the forms of constitution. Best known of such *mandata* is that of Trajan on soldiers' wills.

4. *Rescripta*

These are a cross between *decreta* and *mandata*. They differ from the former in that they are not delivered after a trial in court and from the latter in that they were not spontaneous but in reply to a written request for a decision. In practice they formed two distinct classes —

(a) *Epistolae (epistulae)*: these were full letters written back (*rescripta*) to an official (or a community) that had sent a formal letter requesting imperial guidance on a matter concerning his sphere of action (or its powers and rights). Like *mandata* they might be on any matter (*e.g.* Trajan's rescript to Pliny the Younger on treatment of Christians), but they

were much more likely than *mandata* to be concerned with law. After Hadrian had established a permanent *consilium* of usually salaried jurists, the rescripts became more numerous and consisted of thorough and systematic treatment by experts, one of the most frequent forms of imperial lawmaking. A copy of the rescript was kept in the imperial archives. The actual rescript was signed '*vale*' by the Emperor.

(b) *Subscriptiones*: if an individual wished for imperial guidance on any matter he had to present in person or by proxy a petition in writing (*libellus*). The matter would be scanned by the *consilium* and the imperial answer would be written at the foot of the *libellus*, signed '*scripsi*' by the Emperor, and filed in the archives, a copy being obtainable by the suppliant. Very often these *libelli* would be for a decision on a legal point before time and expense should be wasted on a trial that might in any case end on appeal to the Emperor.

Rescripts and *decreta* did not achieve final authority as quickly as did *edicta*. In post-classical times there was much legislation and discussion on the authority of such imperial statements of law. Justinian re-established the seemingly classical rule that where it was clear from the rescript or *decretum* that a general proposition was being made, not a personal concession, then the answer was to be binding. He reserved, however, the right to interpret all such legislation.

As already seen, the *oratio* of the Emperor came to be regarded as legislative in the latter part of the second century. Ultimately the various forms began to lose their identity and under the Dominate legislative acts were clearly made and were indiscriminately called *edicta*, *constitutiones*, *placita* and *leges*.

(G) *Responsa Prudentium*

This source combined with the *ius honorarium* made Roman law a great system. It was recognised by Gaius and the classical jurists as a source of law and undoubtedly gave the classical law its character as well as its greatness. Yet it differed completely from all the other sources because of its origin in the *interpretatio* of the law. Now this is theoretically not an independent source of law in the sense of legislation or praetorian innovations. It is merely the giving out of the full meaning and implication of existing rules of law: an

interpretes (interpreter) strictly should not add anything of his own just as a translator should not. The consequence is that the authority of rules expounded by the interpreters is not that of the expounders but of the law so interpreted. Thus *interpretatio* of the *ius civile* is an integral part of the *ius civile*, not an addition like the *ius praetorium*. Of course, an interpreter can often, even unconsciously, add implications to what is not explicit in the text interpreted, and even neither intended nor wanted by the writer of the text. So with the *ius civile*: the *interpretatio* in fact extended many parts of the law almost beyond recognition. The process of *interpretatio* strictly so called belongs to the earlier law. Interpretation did revive after a period of formalism and was part of the work of the jurists in the developed law, but it was now more apart from the *ius civile*. The jurists tended to interpret and extend the *ius honorarium* rather more than the civil law, and when they did tackle the latter they tended to use praetorian ideas and methods. It was thus that they themselves recognised their developments of the law as a true source, close to the law but extrinsic of it — not intrinsic in the way that the original *interpretatio* was.

The subject can therefore be dealt with in three main stages: (1) the period of *interpretatio* proper; (2) the period of the *veteres*, the jurists of the late Republic and early Empire; (3) the classical period. However, whilst the features of each are often distinct there is much continuity — especially with the function of *respondere* — and thus they cannot be treated in water-tight sections. Also something must be said at times of both the legal profession itself and the methods of legal education, for they had great influence on the course of the law (as in English law).

1. The period of *interpretatio*. This era coincided roughly with the first half of the Republic and its achievements, and very considerable ones they were, were almost entirely due to the select patrician body of pontiffs. They first displayed the Roman genius for making simple and rather crude rules of law work for the community and keep pace with its development. Their ingenuity and methods were not to be lost with the end of their monopoly: they were a distinct legacy to the jurists of the future.

Now the priests (*pontifices*) had a monopoly not only of the knowledge and operation of the religious law — *fas* or *ius sacrum* — but also of all the law. Although the Romans clearly separated *ius sacrum* from *ius civile* very early and although thereafter the *ius sacrum* with its control of omens and auspices probably had a greater influence on public than on private law, the priests alone appear to have had the training and the time to learn, master and apply the law in all its branches. Whether, as the Roman histories suggest, the pontiffs jealously guarded their knowledge from the plebeians and common people and so maintained a grip over them has been doubted, but the fact of their monopoly is indisputable. The first inroad made into that monopoly was the publication of the *ius civile*, or of its most important parts, in the Twelve Tables after strong plebeian pressure. The people would no longer listen docilely to a pontifical statement of what was right and wrong by civil law. Even so the pontifical hold was still very strong: they still controlled the procedure of the law, either secretly guarding or alone understanding the intricacies of formalities, particularly of the *legis actio* system, which was the only method of litigation and enforcement of rights. People who wished to enforce their rights or achieve any legal result by the elaborate legal ceremonies had to consult the pontiffs. Very probably the *legis actiones* (especially, *e.g.*, the *sacramentum*) originated with definitely religious ritual. Perhaps the pontiffs complicated the legal forms by an intense belief in the 'magic' of such forms: a legal result could not be achieved without exact observance of those forms. If they did so complicate, they cannot be severely blamed: any legal system, it seems, must go through the 'hardening' stage of formalism with its magic before it can truly expand and develop.

The private law was only a small part of the pontiffs' concern — most of their time was naturally spent on religion. However, they did hold themselves out to answer (*respondere*) the questions of the people and probably of the *iudices* also. In time one priest was selected each year to deal with such questions, it seems. The answer (*responsum*) would more often be a coaching of the inquirer as to the ritual he would have to recite to achieve the necessary legal end than a straight answer on what the law actually was. In answer to some queries the more ingenious pontiffs might propound from the

civil law some novel method of achieving a desired result. In addition some of the private law institutions were still very much tied to *ius sacrum* and so were completely under pontifical control: examples are the original will (*in comitiis calatis*) and *adrogatio* and the marriage by *confarreatio* (*post*, p. 101).

Pontifical interpretation was usually of the written rules of the Twelve Tables and other statutes. How far they affected unwritten customary rules is uncertain, but they certainly appear to have expanded and adapted various customary ceremonies and institutions. Some of the *interpretationes* are reasonable expansions of rules, others are remarkable creations of new institutions out of old. A few examples will show, firstly, the more reasonable extensions.

(a) Male terms were taken to include female in the Twelve Tables, *e.g.* in the law of intestate succession and as to *iniuriae* (insults). Later, when a period of formalism set in, it is noticeable that a statute of the mid-Republic, the *lex Aquilia* on damage to property, expresses both male and female forms of the word for slave, presumably to avoid a now stricter interpretation.

(b) 'Dying intestate' was understood to include not only the case of a man dying without leaving a will or a valid will, but also that of a valid will being left but failing because of non-acceptance by the heir or some other supervening factor.

(c) '*Fundus*' (a piece of land or estate) was made to cover '*aedes*' (building) in the law of prescription.

(d) The *actio de arboribus succisis* (action for the cutting down of trees) was extended to vines (*vites*), but the 'magic' of legal ritual required the keeping of the word '*arbores*' (trees) in the *legis actio*, the use of '*vites*' vitiating the whole remedy.

(e) '*Rumpere*' (break) was read as '*corrumpere*' (spoil) in the third chapter of the *lex Aquilia* (while in the first chapter '*occidere*' — kill — was narrowly construed and not extended to indirect infliction of death).

For examples of the wider extensions one need look no farther than that very Roman institution, *mancipatio*.

Mancipatio was a ceremony of conveyance that originated long before the Twelve Tables and looms large in that statute. It involved the claiming by the transferee of the object (*res*) to be transferred and the weighing out of bronze (*aes*) as payment, all in formal witnessed fashion. Certain *res* could be

transferred by it, including slaves, and variations of it existed for the creation of bondage over a free man and of marriage in one of its forms (*coemptio*). Perhaps the latter was an original institution evolved by custom, perhaps it was a very early example of pontifical use of *mancipatio* for a collateral purpose (the creation of *manus*, *post*, p. 102). In any event, *coemptio* was itself employed by the pontiffs for the purpose of collusively changing a woman's family and thus ridding her of an inconvenient guardianship. *Mancipatio* was also used by the pontiffs, so it seems, to effect a simpler form of will by the testator's mancipating his property to a third party who would arrange for its subsequent disposal as the testator ordained (*post*, p. 237, and for this institution's subsequent 'free' development, again probably inaugurated by the pontiffs). *Mancipatio* was also adapted to effect release of a debt, but most striking of all was the history of an interpretation ('twisting' would be perhaps more appropriate) of the rule of the Twelve Tables that three sales of a son (*filius*) into bondage would break the father's power over him. The pontiffs rather daringly, but not unreasonably, used this provision against excessive harshness to found a collusive breaking of the father's power by three arranged sales to an amenable third party. This became an essential part of the institutions of emancipation and adoption (as distinct from adrogation). However, the Tables had said nothing of daughters or of grandchildren, probably because such sales were rarely if ever made. The pontiffs quite brazenly 'interpreted' the rule as meaning that three sales were necessary to free a son only and so one sale would be enough for the others!

The traditional story of the ending of the pontifical monopoly of private law is that around 304 B.C. one Gnaeus Flavius, son of an ex-slave and secretary of a leading patrician, but democratic statesman, Appius Claudius Caecus, stole the pontifical forms for the *legis actiones* from his master (probably, however, with his connivance), published them, and later also published the rather complicated Roman calendar of that time which contained details of the days on which public business could not be transacted for religious reasons (*dies nefasti*). The story is doubted by some, but its main outlines seem feasible; and in any case the results attributable to the publications did in fact occur around that time. Plebeians became admitted to

the pontificate (a possible consequence or at least part of the same trend) and a new class of secular experts arose from the richer strata of society, men with time now to study the law at their leisure and public-spirited enough to give their opinions when requested (*iuris consulti*, whence their usual names 'jurisconsults' and '*iurisprudentes*'). The pontiffs did not cease to be interested in private law and many pontiffs (especially from the *gens Mucia*) appear amongst the distinguished jurists during the rest of the Republic. However, *responsa* were now given by law experts as well, and private law gradually became a side interest of individual *pontifices* rather than part of their duties.

2. The period of the *veteres* (the old jurists). The first great figure of this period was Tiberius Coruncanius, first plebeian Pontifex Maximus in 253 B.C., who was the first publicly '*profiteri*'. The meaning of this term is not clear, but it is generally accepted to mean that he gave public consultations on law and perhaps encouraged students to attend them. From his time various patterns appear.

(a) *Interpretatio* in the dynamic sense of the age of the pontiffs was either dead or dying. The end of that age saw the setting in of formalism and the rest of the Republic saw only a gradual liberalising development passing to the praetor. However, the above-mentioned interpretations of the *lex Aquilia* may have occurred in this second period.

(b) The new class of *iurisconsulti* arose. They were at first aristocrats who were nearly all mainly interested in political careers and treated law as a cultured side-line or as a means of achieving popular support by giving free advice. Most of the great names until the first century B.C. appear as high office-holders, both civic and sacral. From the start the profession was a pursuit for the rich and *responsa* were given with no form of payment.

As time went on and public office became more hazardous and time-engrossing, more and more aristocrats abandoned politics and devoted themselves to law. An early example was the great praetor, Aquilius Gallus, who after 66 B.C. gave up his chances of consulships and concentrated on law. By the time of Augustus there were a considerable number of similar examples of refusal to accept office and only two great

jurists of the last thirty years or so of the Republic held consulships — Servius and Alfenus. Meanwhile the law was growing in volume and lawyers began to specialise.

In the last fifty or more years of the Republic there were two separate professions, each with some contempt for the other. One was that of the jurists, the other, the *advocati*, men who pleaded cases before *iudices* and the criminal courts. They were not lawyers: many were disdainfully ignorant of the law, relying only on the preparation given them in each case by the *jurisconsult*. Some, however, were not without at least a dilettante knowledge of the law, like Cicero, while a few others combined a brilliant career as an advocate with that of giving *responsa*, notably Servius (Servius Sulpicius Rufus). The advocates were thoroughly imbued with general Greek philosophy and the cult of oratory, and the division of litigation into the stages enabled them to be concerned only with the factual pleadings *apud iudicem*. Meanwhile the jurists avoided philosophy for the main and concentrated upon a practical approach to law with their interest especially upon the *formula* and the proceedings *in iure*.

The last years of the Republic saw also a specialisation within the law itself. Q. Mucius and Servius were experts in sacral law as well as outstanding private lawyers, but sacral law was now really a subject apart and in the Empire it gradually died along with the religion it served. More importantly there was a clear division growing between public and private law. In the main the public lawyers remained politicians, prominent in the Senate, and never attained the skill or afforded the time to make the public as great as the private law of Rome. Perhaps, too, the growth of law under the hands of the praetors and the intellectual attraction of framing *formulae* influenced the better brains to concentrate on private law, leaving constitutional law to the politicians. Criminal law under the hands of the quaestors, who had no *ius edicendi* and, being subject to appeals, less freedom than the praetors, never developed like private law. It may be that questions of guilt or innocence always appeal greatly to the advocate, but less to the lawyer, who prefers to think on rights and duties. The advocates may well have played their part in preventing the growth of a great criminal law. As it was, only one famous jurist, Tubero, is noted for his skill in public law as well as private.

In the last years also there is evidence of another, lowlier class of lawyers who, for payment, gave *responsa* and lectured to students. The aristocrats could hardly have dealt with all the queries from the ordinary citizens. They would aid their friends and answer points for the praetor or a *iudex*, and occasionally give *responsa* to others when the point in question was a real test for their skill.

The work of the leading jurists of the time is described as *cavere*, *scribere*, *agere* and *respondere* — *scribere*, however, often being subsumed under *cavere*. *Cavere* was the preparation and advice for legal ceremonies that might involve difficulties — e.g. coaching as to the form of words to be spoken to effect the desired result in a formal contract such as *stipulatio* (*post*, p. 332). *Scribere* was but one part of this cautelary jurisprudence and was merely the drafting of written forms such as wills. The whole process was an inheritance from the coaching of the pontiffs for the early rituals. It is interesting to note that the carefully drawn copy of the formal oral contracts was called a '*cautio*'. Oral forms remained a marked preference of the Romans, however, and many written forms came into the law relatively late and usually under Greek influence.

Agere was the work of preparing a case for trial, suggesting the *formula* to be requested from the praetor and generally briefing the advocate as to the law involved. *Respondere* was the old pontifical practice of giving replies to private citizens, magistrates and judges. The praetors were wont to have a *consilium* of leading jurists to consult on legal difficulties and much of the edict seems to be the drafting of the jurists. Advice to magistrates and judges may well have taken up much of their time.

(c) The classic pattern of legal education came into being. Although at the end of the Republic some of the paid lawyers may have lectured to students and used other academic methods, the leading jurists were too busy and probably thought it beneath their dignity, at any rate at first. The aristocratic youth who wished to make law his career (for the jurist worked as hard for love of his subject as many do for reward) and the one who wished just to have a grounding in law before becoming an advocate or a politician would normally attach himself to a leading jurist — usually as a result of family intro-

ductions. Very often the youth would go to live in the jurist's home and regularly attend him at his consultations and in court: like a barrister in pupillage, he would help with drafting *cautiones* and do hack-work for the issuing of *responsa*. There is evidence too of the jurists' often discoursing at length to their pupils, perhaps later informally lecturing to them. There is no reason to doubt that jurists would greatly enjoy discussing academic problems posed by their pupils and many of their answers seem to have found their way into collections of their *responsa* alongside those in cases that had actually happened.

The pupil was said to have been an *auditor* of the jurist and naturally such a system led to the appearance of lines of jurists owing allegiance to their great masters and predecessors and generally adopting their approach. Occasionally, as always, an *auditor* would later disagree with his master's views and attack them whilst still retaining a warm regard for him. Thus Servius published a work devoted to refuting arguments of his great master, Q. Mucius. The system of 'pupillage' had two great effects: the establishment of what may loosely be called 'schools' and the emergence of a strongly practical, not academic, legal approach.

(d) Finally, it was during the last half of the Republic that Roman legal literature really began and assumed some of the forms it was later to take. Unfortunately none of the works survives today and extracts of them in the Digest are extremely few and meagre. What we know of them comes from the classical writers who cite them in the Digest, from some rather unreliable historical data given by Pomponius in the Digest and from non-legal writers, particularly Cicero.

Most early literature appears to have consisted of collections of forms (particularly *legis actiones* in the *ius Flavianum* of Gn. Flavius, *supra*), statutes and *responsa*. There does not seem to have been anything like an academic treatise. A possible starting-point, however, is the *Tripertita* of S. Aelius Paetus Catus (consul in 198 B.C.), a work consisting of the text of the Twelve Tables, an account of the *interpretatio* of them and the *legis actiones* applicable. Perhaps the last section was the same as the *ius Aelianum* and was a fuller and up-to-date compilation on the lines of the *ius Flavianum*. In any case, Aelius achieved a great reputation amongst later writers.

Certainly he appears to have inaugurated a flow of legal writings, most prominent of which were those of the two Catos.

Fifty years or so after Aelius came three jurists — Manilius, P. Mucius and Brutus — who are accredited with having 'laid the foundations of the civil law', perhaps because they began the practice of discussing law instead of merely collecting forms and publishing *responsa*. The greatest of all the *veteres* was the son of P. Mucius, Q. Mucius Scaevola, a model of uprightness, a stern conservative, consul and *pontifex maximus* (like his father), orator, sacral lawyer — assassinated in 82 B.C. by the democrats. Amongst other works he wrote the first big treatise on *ius civile* and he was the first jurist to classify the law. His arrangement of topics in the law, though later varied, set the pattern for all later works and many subsequent writers on the civil law made their works commentaries *ad Q. Mucium*. Of his younger contemporaries Servius, the friendly rival of Cicero in many trials, stands out as the brilliant man of all the talents. Orator and politician as well, he published the first commentary on the Edict, thus starting another great fashion. He also wrote monographs (works on single topics, e.g. dowries), perhaps the only notable examples of the form in the Republic. There is no evidence of any jurist of the age writing students' books (*institutiones*) or *epistolae*, forms that were to become very popular later.

Although there was thus much important writing in this period, it is probable that much of it was done for personal satisfaction and that the main direct influence of the *veteres* was by their *responsa* and other practical work. The importance of the literature was perhaps to come later with its effect on the imperial writers.

In the hundred and fifty or so years of the Empire before Hadrian and the classical period strictly defined, a great deal happened, but the main accent is on continuity from the trends of the late Republic. The daily work of the jurists continued much as before. The legal education was conducted on the same lines except perhaps that jurists began to lecture to students and the paid jurists grew in number and influence, one of them, Massurius Sabinus, being such an outstanding lawyer that he was raised under Tiberius to the front rank of jurists.

Two great mysteries, however, exist in respect of this age: (a) the *ius respondendi* and (b) the nature of the two 'schools'.

(a) Augustus is reported as having conferred a right to give legal replies in public (*ius publice respondendi*) with his authority. In contrast with the practices of the preceding age the opinion had to be in writing and delivered sealed to the judge before it achieved the imperial authority. Apparently the Emperor did not give any binding force to these *responsa* beyond his own prestige, but that would be strong enough to ensure the judge's acceptance of it. It would, in any case, have been unlike the punctilious Augustus to give more than this indirect force to them even if he had the power. Unfortunately little more is known of the institution. Sabinus is reported as receiving the *ius* from Tiberius and he may have been the first to receive it, or just the first *eques* to do so. The only other recipient reported to have it is a shadowy character, Innocentius, probably in the time of Diocletian. However, from Justinian's introductions to the Digest we may assume that all the great jurists of the Empire received it at least in name and Gaius and others may have received the title posthumously. It was probably just a title by the time of the classical jurists, but its purpose for Augustus seems primarily practical. By his time there must have been very many jurists, all of some standing, and if in a case opinions were canvassed sufficiently each party might easily be able to present an opinion of some jurist in his favour. To mark out certain jurists as specially honoured and to lessen by the new formalities the fear of canvassing would assist the *iudex* in coming to his conclusion. 'Non-patented' jurists might feel badly at the distinction, but they were not forbidden to go on giving *responsa*, nor were those *responsa* in strict law any less effective than the 'patented' ones. It was just another example of the less blatant methods used to extend imperial power. By the time of Vespasian most of the leading jurists were salaried by the Emperor and the law became, along with the army, the gateway to a successful career in public office. By the time of Hadrian the leading lawyers were among his chief advisers and really ran the legal system. Although jurists right up to the end of the classical period published their *responsa* it is doubtful whether they were ever individually consulted as in

earlier days, their function being now to advise the Emperor directly and to draft rescripts and other constitutions.

The chief problems, however, arise over the *ius respondendi* from a constitution of Hadrian and a passage in Gaius. Now neither *explicitly* refer to the *ius* and there is much controversy whether they do at all or, if they do, what effect they have. Gaius states (I. 7) that *responsa prudentium* are the decisions and opinions of men empowered to lay down the law; if their decision is unanimous it has statutory force, but the judge is entitled to follow which decision he likes if they disagree; and this is the result of a rescript of Hadrian. The wording bristles with difficulties, but it cannot really be doubted that it is as Gaius wrote it soon after Hadrian's time. The 'empowering' may refer to the *ius respondendi*, and perhaps Hadrian had been consulted by a perplexed *iudex* because the old pre-Augustan mischief had arisen — too many jurists now had the *ius*, but Hadrian was not prepared to limit the judge's discretion except where there was no doubt.

But what were *responsa* now? Were they still replies (as in Augustan times) only to the case in issue, or could the decisions on previous cases of exactly similar facts be cited? Did other opinions than strict *responsa* have binding effect if all agreed? Was the judge bound to follow one of the opinions put forward or was he free to disregard all and decide on entirely new reasons? All these questions are unanswered. Many maintain that only *responsa* directed to the actual case were authoritative and the general authority of juristic writings, *responsa* included, was long subsequent to the classical period. However, it does not seem too daring to think that, in an age when imperial constitutions were *lex* and a jurist received authority to consolidate the Edict and many others drafted laws, the general opinion on any matter, however expressed, should have statutory force so long as it emanated from select jurists and was unanimous.

(b) In the Principate two 'schools' emerged — the Proculians and the Sabinians (or Cassians, as first named). We have a list of their leaders and in the Digest numerous instances of their disputes. According to Pomponius (not the soul of reliability) the schools began with the dispute under Augustus between the politically republican, but legally progressive, Labeo and the time-serving, legally conservative, Capito, but

it is doubtful whether anything other than a vague tradition of disagreement was passed on to their disciples, as probably occurred in cases under the Republic. Perhaps these traditions grew into a definite line of approach to the law under Tiberius, with Sabinus taking on the outlook of Capito and Nerva that of Labeo; but it is more likely that Sabinus set up rather than inherited the tradition of his school, although the influence of Labeo, one of the greatest jurists, probably did characterise the Proculians. It is possible that Sabinus in his lecturing so affected his students that they formed a body under the most prominent of them, Cassius, and sustained his views and his teaching methods. At the same time Nerva's successor, Proculus, the contemporary of Cassius, may well have 'organised' a counter body along with the younger Nerva. But all is speculation. All attempts to read into the limited historical evidence and the Digest texts a difference between the schools on either political or Greek philosophical bases are very unconvincing. Whatever the origin and the organisations of the schools they appear to be based more on personal allegiances than on any basic theoretical differences; and this fits well into the abiding tradition of Roman jurisprudence as a *practical* system.

The two schools contained all the leading jurists until the time of Hadrian. Under him the Sabinians were led by Julian, who is notable for his very progressive views and for his readiness to dissent strongly from previous Sabinians. It is generally agreed that Julian was so eminent that the desire for continued controversy died out and his authority more or less killed the schools. Gaius and other lesser jurists might still look back at the great intellectuals and nostalgically inherit from their teachers the views of the Sabinians or Proculians and call themselves the one or the other, but in all probability the lawyers of the classical period were unified in the service of the Emperor and the new style was to embrace all learning that went before and to digest it all with a free mind. Personal loyalties to great jurists remained with their disciples, but the climate had changed and was no longer such as to encourage the existence of schools.

3. The Classical Period. The period of the schools merges into that of the classical period even more smoothly than had

the republican period into it. The pattern of literature had expanded throughout the intermediate period and the work of Sabinus on the civil law gave rise to more commentaries (*ad Sabinum*) even than that of Q. Mucius. The commentaries on the edicts had now become the most important works and in the classical period they show a definite fusion by the jurists of the *ius civile* and the *honorarium*. Whether, if the classical period had long survived the *formula*, the process would have ended in a complete merger of the two now that procedure made no difference, is disputable; certainly the cautious Byzantines with veneration for the past did not clear away a now meaningless distinction. Legal education of the classical period was probably now professionally carried on by lecturers, perhaps publicly paid, and the jurists no longer had the time to teach and merely influenced their juniors by their writings. The professional teachers produced text-books (*institutiones*) for their students; some of the more distinguished jurists also produced institutes and works of a general, quite elementary, character (*sententiae, regulae*) but probably for somewhat different purposes.

The eminence of Julian under Hadrian and his successors was matched under the Severan Emperors by that of the three great writers of the later period — Papinian, Ulpian and Paul. All held the highest office of state at the time, the *praefectus praetorii* (commander of the praetorian guard), and two at least came to a violent end in those troubled times despite their fine records of service to the State. Papinian received the greatest tributes of all and it is difficult to decide between him and the earlier Julian as the greatest Roman jurist. However, it is Ulpian and Paul that sum up the Roman achievement. Whether or not they were intellectually as great or original as their predecessors they had the needed quality of collecting, sifting and synthesising all the mass of previous writers. It is not without significance that over half the Digest fragments are taken from their pens.

After the murder of Ulpian and the disappearance from history of Paul under Alexander Severus there remained but a few jurists of note and all of lesser stamp. The most famous is Modestinus, and he, after holding a lesser prefecture (of the *vigiles*) until 244, fades from view and with him the classical period and the greatness of Roman legal science.

The classical period was the age of the great Roman legal geniuses. Built on the work of the *veteres* and their successors and on the *ius honorarium*, Roman jurisprudence reached its highest point. If it was dominated by procedural questions its law none the less majestically fulfilled the needs of the community and kept remarkably abreast of social changes. It may be fairly claimed that the *formula* for all its defects and its ultimate need to give way to the *cognitio* was a better weapon for legal expansion than the English forms of action. When one views what little of the classical law that has certainly survived, and painstakingly abstracts other portions of it from the Digest of Justinian, one is struck by the single-minded and forceful purpose of the law to provide a just solution to any case that arises. It is this law, not that of Justinian, still fine and all but fully evidenced though his law is, which modern scholars must ardently search for and study as perhaps the greatest age of law.

Beyond the works of Justinian with their many hidden changes of the classical law, changes wrought not only by his compilers but also by commentators and transcribers over the centuries between, very little of the classical law has come down to modern hands. Seemingly classical texts entitled as works of the later jurists, Ulpian and Paul, are all post-classical with many distortions of the original versions and are in any case only the smaller elementary works retained for the less gifted lawyers of later years. One work alone has come down to us in anything approaching completeness—the Institutes of Gaius.

Gaius is not only our main direct source of classical law (and also of much useful legal history, which he seems to have delighted in, unlike most Roman jurists), he is also one of the major mysteries of Roman law. That he lived and wrote in the years of Hadrian, Pius and M. Aurelius, that he may well have been a provincial Roman or rather a Roman who had considerable acquaintance with the provinces, that he was not in his time a leading jurist but probably only a professional teacher, and that it was only after his death that he received veneration by post-classical writers and Emperors because of the clarity of his exposition of the law, are all generally accepted, though not universally. Beyond that little is known, but much conjectured. Justinian used his Institutes as the main basis of his own and incorporated in the Digest a fair number of extracts

from other works of Gaius (*e.g.* the *Aurea* and a commentary on the provincial edict). Whether the Institutes were original work or an edition of an earlier great jurist (*e.g.* Cassius) or whether they were lecture notes published post-classically under the lecturer's first name are much debated along with many other questions.

The modern recovery of the Institutes makes a romantic story. In 1816 the historian Niebuhr discovered that under a text of St. Jerome in the Verona library there was a layer of parchment on which a legal text was written. Shortage and expense of writing material made such palimpsests (covering over of texts by other layers and thus retaining the firm basis of the *codex* or book) common in the middle ages. Suspecting that it was a copy of Gaius he sent for the great Roman lawyer of the day, Savigny, who at once confirmed his suspicions. For nearly fifty years the work of restoring the text as far as possible went on and nine-tenths were finally salvaged. Deductions from post-classical epitomes and two twentieth-century discoveries in Egypt have helped to fill in some of the gaps. The Verona text was written in the fifth or sixth century and thus inaccuracies and interpolations are possible, but the Egyptian fragments of the third century confirm rather than undermine the authenticity of the main text and, while there is still that possibility of doubt that will continue to make adventurous scholars reject as post-classical insertions parts of the text inconvenient to their theories, the Verona *codex* remains an invaluable picture of classical law.

After the classical period there were very few juristic writings. A few appeared in the more settled times of Diocletian and were slightly used in the Digest. Otherwise the most important activities were the collections of imperial constitutions which began to appear around the same time. Two private, or perhaps semi-official, compilations dated from the last decade of the third century, the Codex Gregorianus and the Codex Hermogenianus, but they may have been later. They contained constitutions going back to Hadrian, but the vast majority were recent.

As the centuries passed after the classical period, legal science decayed fast and without any fresh juristic writings judges more and more looked back at the classical lawyers,

many of whose texts had already become mangled. The ultimate state of decadence can be seen in the Law of Citations issued in 426 by Theodosius II and Valentinian III for the whole Empire. It tried to sort out the tangle of authorities by decreeing that where a point was in dispute any views of five writers—Papinian, Ulpian, Paul, Modestinus and Gaius—should be consulted and the majority view should prevail: in the event of 'a tie' Papinian's view should prevail; if he were silent and there were 'a tie', the judge could decide as he liked. The reliance on the late jurists (especially Modestinus) shows the lack of genuine research at the time and the inclusion of Gaius shows clearly his posthumous eminence. No longer could a judge really be trusted to weigh the merits of the arguments involved: he must have a rule of thumb.

After the Law, Theodosius set out to make a complete compilation of all the writings of the jurists and of all the imperial statutes. He tackled only the latter task, the former being beyond the men he had at his disposal. The official Codex Theodosianus of 438 contained all the constitutions since 312 that were still to remain in force, leaving the privately compiled *codices* still valid for pre-312 laws that remained effective. After Theodosius new constitutions (*novellae*) were periodically compiled and legal science gradually began to revive in the East, particularly at the university of Beyrout, and by the time of Justinian jurisprudence was at its highest level since the classical age and the men could be found to do the work that Theodosius had been unable to complete.

III

Justinian's Compilations

Justinian came to the throne in 527 succeeding his uncle, Justin, by whom he had been adopted. During Justin's reign he had taken an increasing part in imperial affairs and had formed many ambitions for his coming reign. He was a man of great energy and considerable ability, but his greatness perhaps rests upon the rare and fortunate gift of being able to choose great ministers and generals. His reign was filled with great achievements, but few of his many conquests lasted.

His greatest achievement, however, certainly did last — the codification of the law of Rome that he had set his heart upon as a testament to the greatness of Rome as well as of himself.

To carry out this massive work he was blessed with just the right minister, Tribonian. The latter was an extraordinary man with a remarkable reverence for the law of the past and great organising ability. Much of the codification bears his stamp upon it and it is noticeable that Justinian's stream of legislation is mostly concentrated into the first years of his reign up till 540 and it may well be that from then Tribonian's energy gradually failed until his death in 546. Besides Tribonian, Justinian was fortunate in having other able civil servants, a revived legal profession and most importantly the professors of the very vital law schools, especially Theophilus and Dorotheus.

(A) The *Codex Vetus*

The first task for the compilers was to collect all the imperial legislation still in force and put it into some sort of order. The job was no doubt made easier by the existence of the Code of Theodosius and the earlier *codices* and it was begun within a few months of Justinian's accession and completed in 529 in just over a year. It received imperial authority and superseded all the previous legislation and *codices*, depriving them of legal effect.

(B) The Digest

The next and most impressive task was the compilation of *ius* as opposed to *lex*, the sorting out, bringing up to date and putting into order of all the many surviving juristic works of the classical and earlier periods. To clear the ground for this work a considerable measure of legislation had to be passed to exclude obsolete laws and rules. In 530 a set of constitutions, known as the Fifty Decisions (*Quinquaginta Decisiones*), were published shortly before the compiling began. It is not easy to sort out from the later code what these 'decisions' were. It is thought that they had in fact to be greatly supplemented by measures to rectify difficulties arising during work on the juristic texts. As a result, it became clear that a fresh code would have to be drawn up after the work on the Digest had finished.

In 530 a commission of sixteen was selected by Tribonian to tackle the work under his presidency. They were instructed to digest all the writings of those jurists who had received the *ius respondendi*, it seems, but in fact some jurists who probably did not have the *ius*, e.g. Gaius and Pomponius, and some Republican jurists, especially Q. Mucius, who could not have had it, were included in the final work. The compilers were ordered to bring up to date all the material and empowered to alter, delete and insert with regard to all texts. At the same time, out of reverence for their greatness, the name of the jurist and the title of the work abstracted had to be cited at the beginning of each fragment. Unfortunately no indication is given of the changes in the text so that an author may in fact have said the exact opposite of what he is recounted to have stated. It is this that has induced so many scholars to scrutinise the texts so thoroughly in the search for these interpolations (and those of transcribers previous to Justinian) and to attempt to reconstruct the original texts. Much controversy has arisen over the number of these interpolations, but perhaps the conservative view is best that the commission had so much to sort and did it in such a short time, three years, that wholesale changes and reconstructions are unlikely.

Evidence from the Digest itself and from Justinian's prefaces shows that the work consists of 150,000 lines abstracted from between 1500 and 2000 books consisting of some 3,000,000 lines. Thirty-nine authors were used (but many more were quoted by them in their fragments), but a vast proportion of the work is taken from the pens of the later classical writers who were so lucid and so excellent at reproducing previous arguments in simple form. Thus Ulpian occupies over a third and Paul more than a sixth of the page space. On the other hand, two authors contribute only one fragment each, whilst ten supply less than a dozen each.

The work is arranged in fifty books, subdivided into varying numbers of 'titles' (except Books XXX-XXXII, which together form just one title on legacies) and each title is itself subdivided into fragments from the various jurists, which may consist of a half-line interjected between other fragments or of extracts running into several pages. The practice for citation is to work down from the number of the book through title and fragment numbers to the sections therein, if more than

one, the opening section being cited as 'pr.' (*principium*) and those following '1', '2', '3' and so on. (Thus D.9.2.27. 13, 15, 16 or D.9, 2, 27, 13. 15. 16 for the 13th, 15th and 16th section from the 27th fragment — by Ulpian — in the second title — on the *lex Aquilia* — of the ninth book.) The arrangement of the work is a little strange, the order probably being taken from the larger classical works, and many titles are taken from the Edict. The order within the titles often seems chaotic, the result of the compiler's haste.

In 1818 the German scholar, Bluhme, published a theory that the commission split up into three groups, each being given roughly a third of the books to digest. These thirds he termed 'masses' and they were made up of books with a common theme. Thus the 'Sabinian' mass consisted of works on the civil law, especially those of Paul and others *ad Sabinum*; the 'Edictal' of commentaries on the edicts, especially Paul's and Ulpian's; and the 'Papinian' of a more amorphous group, with some of Papinian's works being prominent. As their work was progressing some other works came to light and these were digested last as an 'Appendix'. Each title will normally begin with extracts from one of the masses (Sabinian very frequently, but Edictal where the topic is primarily *ius honorarium*) and thereafter will come relevant materials from any of the other masses (with the Appendix last), but small extracts from some of the other masses will often be inserted, where appropriate, between fragments of the earlier and later masses. Bluhme's theories, but not all his conclusions on the individual titles, have been almost universally accepted and have greatly contributed to the scholarship of Roman law.

The Digest was published in Latin in 533, but translated also into Greek. It is also known as the Pandects. As already seen (*ante*, p. 9) the 'rediscovery' of the Digest in the eleventh century was the start of the great revival of Roman law in the Middle Ages.

(C) The Institutes

Besides the work of compiling all the law, Justinian also completely reorganised the system of teaching at the law schools, providing a five-year course with lectures for the first three years and private study for the last two. So as not to

make the freshmen face the rigours of the Digest and Code immediately he ordered the edition of an elementary work. The task was entrusted to the professors Theophilus and Dorotheus under the supervision of Tribonian. They modelled the work especially on the Institutes of Gaius, but, besides abstracting from them, they also used those of Marcian, Florentinus and others. Like that of Gaius the work was in four books, but Justinian subdivided them into titles and then into sections whereas Gaius had subdivided straight into sections (thus, the citations of, *e.g.*, G.2.70 and J.2.1.20).

The Institutes were published shortly before the Digest in 529 and, surprisingly, like it were given the force of statute. Although it is an elementary work there are propositions in the Institutes not in the Digest and there are a few discrepancies between the two. Perhaps the force of law was added to give it added prestige for students.

(D) The New Code

There had been much legislation in the period since 529, especially in connexion with work on the Digest and so, when the latter was complete, Tribonian headed another, smaller, commission to revise the Code. Some considerable changes from the first work (which has not come down to us in any bulk) appear to have been made. The new Code (*Codex Repetitae Praelectionis*) consisted of twelve books, subdivided into titles and then into fragments bearing the name and occasion of the imperial constitution cited. The manner of citation is similar to that of the Digest. The breaking up of the work into titles means that some constitutions dealing with diverse topics were split up into various parts of the work. Nearly all the constitutions incorporated date from after 200 and the earliest is one of Hadrian's. As in the Digest one book of the Code is devoted to criminal law.

The Code was promulgated in 529 and also superseded all previous codes and legislation. As with the Digest there are many interpolations and much work has been done to discover them.

These various parts, the Digest, Institutes and Codex, form what is known as the Corpus Iuris of Justinian, and the Emperor laid down strict laws endeavouring to control future

literature and especially forbidding commentaries upon them. However, even in his lifetime these laws were disregarded.

Normally appended to the *Corpus Iuris* is a collection of Justinian's many later constitutions, known as the Novels (*Novellae Constitutiones*). The collection is derived from a number of unofficial collections. Some of the Novels, e.g. 118 and 127 completely reorganising intestate succession, had great importance in the private law, but most were on public and ecclesiastical matters. Nearly all were in Greek.

IV

The Divisions of Law

The Romans made several general classifications of their law. Some of the classifications are not subtle, as with the *ius scriptum-non scriptum* division (*ante*, p. 13). Often the terms are used with different shades of meaning which a Roman would easily catch, but can easily puzzle the most expert scholar. In general it can be said that exactness does not characterise Roman conceptions and that in many cases their ideas and classifications are stated very much under the influence of Greek philosophy.

Some of the classifications, e.g. into *ius sacrum*, *privatum* and *publicum* and into *ius civile* and *honorarium*, have been noted in the treatment of sources. Another, however, has caused a mass of difficulties. This is the division of Roman law into *ius civile* and *ius gentium*, a division complicated by the occasional intervention of *ius naturale* as well.

The key to the division seems to lie in the idea of *ius civile*. This is by far the oldest term. It goes back to the ancient times of the small city-state, often at war and nearly always antagonistic to outsiders. It means the body of law that the Romans of that day applied amongst themselves for the settlement of their disputes. Besides the notion of 'law' in '*ius*' there may well be also an idea of 'right' or 'privilege': the law is the citizen's privilege. The foreigner who is allowed to benefit to any extent under that law is definitely privileged in Roman eyes: he has the *ius commercii* — the right to engage in formal transactions and to sue in the courts — or the *ius*

conubii — the right to marry with civil law consequences. But the mass of peregrines have no such *ius*, such privilege. It was only with the need to trade more widely and the advent of the peregrine praetor that Rome really began to recognise that there should be rights and institutions that peregrines should be able to share. Thus nearly all the Roman law of obligations became applicable to *cives* and *peregrini* alike, either by extension of what had been strictly *ius civile* (e.g. *stipulatio*) or by introduction of trading practices or by a mixture of both.

This relaxation of the national attitude in respect of trade did not, however, lead to any gradual abandonment of Roman pride and consequent insularity. Cicero, whilst praising Greece for her culture, clearly expresses the Roman contempt for her law and for the law of all other states. Perhaps Rome's rise to pre-eminence in the world contributed to the retention of this view. Certainly it can be said that no concessions to general tolerance were made in the fields of family law and succession and that whilst a peregrine's property was protected by Roman law it was so only by praetorian remedies and never was he regarded as owner in the Roman sense. The general rule remained that where a statute introduced a new law the peregrine would only be affected by it if he were expressly mentioned or if the praetor extended it to him. The attitude was: the peregrine will belong to another state and let him look to that state for any rights beyond those which Rome must for convenience allow him; if he belongs to no state, then he must be an outcast and fend for himself as best he can under the laws of the places where he goes.

In fact, this law which the Romans felt was their own was very largely the rules contained in the Twelve Tables and a few other *leges* and the *interpretatio* of them all. To the Romans *ius civile* was *lex*, especially the Tables. This brought in the idea of *source* in addition to that of *application*, and in the new sense it was properly to be opposed to the *ius honorarium*. Now the latter, being less formal, was in the main developed without excluding any particular persons: an *actio in factum* would be given to a peregrine in the same form as to a *civis* and there would be no need for any fiction to extend it. Yet where the praetor was building on the *ius civile* peregrines might well be excluded, e.g. the system of *bonorum possessio* constituting praetorian succession on death. This

latter was sheer *ius honorarium*, yet it might in one sense be called *ius civile* — though no lawyer would ever have used such a term.

This, then, was basically the attitude of the developed law of the Republic and the early Empire. The limitations against peregrines were recognised, but there does not seem to have been any name given to such law as was applicable to them as well as to citizens. It was now, however, that Greek thought began to influence Roman ideas. Aristotle had observed from his studies of laws of many states that each law contained parts that were peculiar to it and parts that were generally to be found in other states — a special law and a general law. Moreover, he and others in constructing their philosophies postulated the existence of divine laws and, in particular, of a law of nature based upon reason to which man ought to conform. This natural law was quite distinct from the law laid down by man, *i.e.* by particular states (positive law), although the positive law might well contain, and ought to contain, much natural law and ought not to conflict with it. The temptation to equate general and natural laws was clearly there, and much learned thought was put into the problems of such an equation. Ultimately it became settled that, with the important exceptions of slavery and the institutions of war — which were both generally recognised throughout the Mediterranean — and a few minor ones, the general and the natural laws are one.

Roman philosophy, exemplified by Cicero, welcomed these Stoic conclusions and eagerly translated them into Roman terms. Both positive and special law were represented as *ius civile* and the term *ius gentium* (an expression probably used previously only to describe the ancient rules of international law, *e.g.* those to do with the treatment of heralds) came to be used for the general law. At the same time the expression *ius naturale* became current and the Romans continued the Greek controversy on whether slavery was natural or not. Though they too decided it was not, but only '*ius gentium*', slavery continued to the end of Roman law.

The lessons of philosophy seeped through to the jurists, who, as practical men, were not really best suited to assimilate them. The late classical jurists (especially Gaius) and the post-classical interpolators took great pains to impose the

philosophic conclusions on the long-existing Roman institutions. Crude comparative law occurs here and there in the texts (*e.g.* another race is found with something similar to the Roman *patria potestas*), but more importantly that law which was available to peregrines began to be called *ius gentium*. Other rules that seem both general in application and reasonable in nature are variously described as *ius gentium* or *ius naturale*. It is, however, very doubtful whether the lawyers ever used the ideas for any practical purposes — the usages were *ex post facto* rationalisations. Perhaps this is why so many of their references to the ideas are vague and puzzling. The references were inserted rather as exotic ornamentation. Attempts to draw a clear line through the texts between a theoretical (*i.e.* philosophical and essentially comparative) sense of *ius gentium* and a practical one (*i.e.* based on exclusion of non-Romans) are not likely to be very fruitful. Much the same can be said of *ius naturale*.

The Roman institutional works varied in their order, but ultimately there prevailed that which we find in Gaius. Whether he originated it is much disputed and is very doubtful. Certainly, however, his order was the one adopted by Justinian in his Institutes. It divides the law into three: (i) the law of persons, dealing with the acquisition and loss of status, not with the legal effects of that status except rarely in passing (more in Justinian than in Gaius); (ii) the law of things (*res*), which is itself divided into three — (a) the law of property in the strict sense, mainly concerned with acquisition, (b) the law of succession and (c) the law of obligations; and (iii) the law of actions.

PART TWO

THE LAW RELATING TO PERSONS

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THE law of persons is not, as one might expect, the law that affects legal relationships of persons in some way (e.g. the law of capacity), but almost entirely just a statement of the various *status* in Roman law and how they were attained and lost. It is a summary of the various types of person whose status may affect the rules laid down in the main body of law: the effects of the status in question are in the main, and especially in Gaius, completely ignored.

According to the Romans there are three degrees of status — *libertas*, *civitas* and *familia*. However, neither Gaius nor Justinian in their Institutes deals with *civitas* specifically, although Justinian has the more to say in pursuance of his threefold classification of *capitis deminutio*. Although in Gaius' time there were many more peregrines than under Justinian their status was hardly likely to affect normal legal relations in the *ius privatum* as the question of freedom was. The normal free person was a citizen and at least by the classical period the *ius gentium* was so extensive that few *ius civile* relationships could arise in which a peregrine was likely to want to be concerned. Probably citizenship was much more a question of public law. The non-citizen *status* mentioned are normally dealt with as part of the discussion on liberty, and quite a number of other *status* are nowhere mentioned by Gaius.

The Romans, especially in the classical period, do not seem to have had any real notion of personality. To them a *persona* was essentially a human being, including alike slaves and free men. Occasionally it might have a specialised meaning signifying in particular someone who could be a party in court proceedings, so that in some texts slaves and persons *alieni iuris* are excluded from the term. An interesting example of this usage occurs in the law on restitution of *dos* where the *pater-familias* must sue *adiuncta filiae persona* when his daughter is

divorced when normally, as a *filiafamilias*, she would have no capacity to be a party.

To a modern analytical jurist personality consists of the ability to be a subject in legal relationships and thus a legal person is an individual entity endowed by the law with rights and duties (including, for instance, corporations and perhaps trade unions). The Romans, practical lawyers, did not concern themselves with the analysis of rights and duties and other legal relationships: their classification of rights was crude in comparison with their expert treatment of individual rules and institutions. Thus ideas of non-human personality in Roman law would appear mainly to be rationalisations by modern civilians. For the Romans *persona* probably involved a human will and discretion, elements which affect law and relationships in a way nothing else can. Therefore, the mere fact that certain rights really or apparently belonged to some non-human institutions would not lead the Romans to consider those institutions as clothed with personality. In fact, in most cases either some other device or fiction was used (*e.g.* the *hereditas iacens* which either represented the personality of the deceased or else was just a vacuum, entry by the heir being related back to death) or else the rights were vested in an individual. Thus where we might consider the rights to be in the *Fiscus* or imperial treasury the Romans tended to place them in Caesar, and in any case the indiscriminate and inconsistent usage of terms in the texts again proves that to the Romans it did not matter. Charitable funds were normally vested in bishops under Justinian and those of *collegia* and other lay foundations in their administrators; whilst the fact that debts due to a *universitas* were not considered due to an individual member and other similar rules hardly prove any theory of corporate personality.

I

Libertas and Slavery

(A) The Legal Position of the Slave

Gaius gives us no definition of either slavery or liberty. Justinian, however, does indulge in definitions and adopts for

his Institutes those of Florentinus cited in the Digest. 'Liberty is the natural ability of every man to act as he wishes except as force or law prevent him.' This is of course a purely non-legal definition which involves both the actual fact of freedom and the legal consequences for wrongful acts: the 'except' clause vitiates the whole meaning. Although the definition is useless its spirit is informative, for it shows that lawyers in Rome did think of liberty as a true natural, not a technical legal, concept and that there was a presumption towards freedom.

'Slavery is an institution of the *ius gentium* by which a man is subject to the ownership of another contrary to nature.' This too bristles with difficulties. The *ius gentium* element is introduced because the original source of slavery was considered to be capture in war and thus a result of *ius gentium*. However, much of the law of slavery is *ius civile*. 'Contrary to nature' is probably a Greek philosophical innovation. The important substantive part of the definition is 'the ownership of another' (*dominio alieno*). This is truly the Roman definition and, though it has objections to it, it does characterise the Roman attitude to slavery. The fact that some slaves were not in the *dominium* of any particular owner does not matter. The important point is that the slave is subject to ownership — he is a *res*. To the Romans a *res* was a chattel or thing capable of expression in pecuniary terms even though unowned or for some reason not capable of ownership. The Roman definition of *res* is economic, not physical: the essence was potential value. Thus a slave was a *res*, the only human *res*. Therefore, even slaves without masters (slaves manumitted subject to a usufruct; *servi poenae*, convicted of serious crimes; slaves abandoned by their masters and therefore *res nullius*; and possibly free men fraudulently posing as slaves and sold as such to a usufructuary) were *res*. The 'of another' was really surplusage because there was no ownership of the body of a free man. The important term is ownership (*dominium*), which would appear to be an abstract idea, potential ownership, rather than any relationship necessarily implying an owner.

Some modern writers prefer to regard as the essence of slavery the utter rightlessness of the slave, and indeed for modern lawyers that rightlessness is probably the most

important and interesting feature. However, the Romans themselves did not think of the institution in such terms: they avoided systematic treatments of rights and duties and personality. There has, nevertheless, been much discussion of the nature of slavery in the light of modern analytical jurisprudence.

Against those who define slavery in terms of rightlessness it is often argued that, especially under the Empire, slaves were not completely rightless. Thus a constitution of Antoninus Pius in respect of ill-treatment to slaves and the power of *servi publici* to leave property from their *peculium* by will are cited as examples of rights belonging to slaves. However, these and other rules only prove that Roman law recognised the humanity of a slave and thus his ability to affect legal relationships: they do not give him personality in the strict sense of a modern analytical jurist. That a slave can affect his master's position by contract and delict does not presume rights in the slave. The application of Hohfeld's analysis of 'rights' shows this clearly. Various legal rules relating to slaves could be couched jurisprudentially in terms of privileges, powers and immunities (or their correlatives) centred in slaves, but there is no rule of Roman law that gives them either a right or a duty, not even, it is submitted, where their acts before manumission might saddle them with liability for them after manumission.

Only in respect of criminal law can a case be made out for the existence of personality in the modern sense. The slave came to be protected by various laws, and he was always liable to criminal sanctions, very much as a *civis* was (although, of course, there were crimes which only a slave could commit, e.g. running away, and others which a slave could not commit, e.g. where the punishment was inappropriate). This may be analysed as indicating duties in the slave — it is usually regarded as wrong to speak of rights under the criminal law, except, possibly, as existing in the State or the people. Even so, in Roman law the slave was not strictly a *persona* in respect of his appearance in court: some free person, normally the owner, had to defend him, and only in default of such a person was the slave eventually conceded the power to defend himself. Finally, as with modern systems, it is dangerous to endeavour to draw conclusions on rights and duties from criminal law, where policy always tends to predominate over

principle. As far then as the all-important private law is concerned, the slave had no rights and no duties. The whole discussion is a most useful one in modern jurisprudence where examples of rightless human beings are few, but it seems totally alien to Roman thinking on slavery.

The Romans never hesitated to regard the slave as the human being that he was despite their treatment of him as a *res*. He was indeed a very special *res*, and their terminology and various rules clearly show this. Thus he alone of *res* was subject to *potestas* — *dominica potestas* in contrast with the *patria potestas* over free children within the *familia*, yet an institution that is always very closely associated with *patria potestas* in many parts of the law. In the Twelve Tables injuries to slaves are dealt with alongside those to freemen and are compensated by half the sum laid down for the freeman's injury. Later, in the *lex Aquilia*, the slave is classed with cattle where loss is caused the owner by their injury. The two statutes clearly demonstrate the dual character of the slave.

There were a number of cases, especially in the developed law, where the Romans recognised the humanity of the slave as requiring special rules. Some may be regarded as concessions to the dignity of man, others as opportunities to employ the unique potentialities of the slave.

(i) Rescript of Antoninus Pius: under this a slave who was badly treated by his master to the point of excessive severity could seek refuge in a temple or by the statue of the Emperor and thus induce the magistrate to hold an inquiry; if the complaint was proved, the sale of the slave was ordered and the master was perpetually barred from reacquiring. It is one of a number of pieces of legislation stretching from the last century of the Republic throughout the Empire and aimed at mitigating the lot of the slave on humanitarian grounds. In general, these laws differentiate the slave from other *res* little more than our laws against cruelty differentiate animals from other property. However, the rescript is interesting in that it enables the slave to initiate a process, albeit by a very circuitous route, towards a judicial investigation and an order affording him relief.

(ii) *Fructus*: as early as the Republic it was settled that where there was a usufruct of a female slave (*ancilla*) a child born to her during the usufruct did not count as '*fructus*' so

as to accrue to the usufructuary. Unlike the case with animals the child belonged to the *dominus* of the mother, and this seems to be based primarily upon distaste for classing any man with the animals. The possible other related reason, *viz.* not separating child from mother on humanitarian grounds, seems partially thwarted by the apparent rule that the usufructuary did not acquire even a usufruct in the child.

(iii) Consanguinity : there could be no marriage between slaves, but a regular sexual relationship was allowed in very many cases and was known as *contubernium*. Blood relationship arising from such a union was recognised to prevent incestuous marriages after manumission. In the Empire other rules arose. Thus '*filius*' could mean a son born in slavery where no other son existed. Again, where slave brothers were sold and an *actio redhibitoria* was brought to revoke the sale of one of them for a latent defect in quality, all or none of the brothers had to be returned. Justinian, in his final ousting of *agnatio* in favour of *cognatio* in the law of succession, put cognates born in slavery but later manumitted in line for succession.

(iv) Agency and duality : at civil law a slave could acquire for his master (even by the formal *mancipatio*) and could enter into a purely unilateral contract for the benefit of his master. He could not, however, inflict any pecuniary detriment on his master : any alienation would only operate where the master consented, the slave contributing little more than the physical part of the transaction. If a bilateral contract were made, then however advantageous it might be to the master, he could not be sued upon it ; if, however, he adopted the contract by suing upon it, the other party could enforce his side of the bargain to the full amount in the action brought. By praetorian law a slave could bind his master with contractual liability after the *actiones adiectitiae qualitatis* had been developed in the late Republic and early Empire : it was mainly, indeed, through these actions on the contracts of slaves and *filiifamiliarum* that the Romans achieved what law of agency that they did. A slave could also be instituted a legatee and thus acquire for his master, so long as the latter assented. The slave's ability to acquire was a great asset, especially where the master was, *e.g.*, a very young child or mad and thus unable to acquire for himself.

The important point is that in many of these instances there is a definite duality of persons, not just a 'real' or automatic representation. Thus the slave's knowledge in *usucapio* might well affect the *dominus* and prevent the necessary *bona fides*, whilst knowledge by a slave of a *vitium* (latent defect) in a *res* sold him could exclude the master's action for restoration or damages. There are, moreover, a number of rules in the law of succession to show that one cannot just read the name of the master for the time being for that of the slave instituted heir.

(v) Capacity for freedom : humanity made the slave the only *res* that could cease to be a *res* other than by destruction. Manumission by his master and some other events could make the slave a free man.

(vi) Survival of incidents into freedom : a slave instituted heir in a will and later manumitted could personally succeed to the testator. Again, where a slave made a contract, he could be under a *naturalis obligatio* by virtue of which, if he made performance after becoming free, he could not recover for such performance on the ground of his not being liable — although he could not be sued for performance if he had not performed. Also, if he committed a delict, his master was liable either to pay the damages involved or to hand over the miscreant, and such liability, known as 'noxal', followed the slave into whosoever hands he came : the plaintiff could sue the master for the time being, not the master at the time of commission. This rule of noxal liability applied, with minor variations, also to the wrongs of sons in power and harm done by animals. In the slave's case it is interesting to note that upon his gaining freedom the liability attached to him personally for the full amount due.

(B) The Condition of the Slave

In early Rome there were very few slaves and, whatever their theoretical position, they would be precious and often well-regarded members of the household (*familia*), little different *de facto* from the *filiifamiliarum*. The *ius civile* rules in respect of the powers of the *paterfamilias* to inflict punishment, even death (*ius vitae necisque*), extended to slaves and children alike, as did the rule making all acquisitions accrue to

him. While a slave could be alienated at will, a *filius* could be sold *trans Tiberim* into foreign slavery or within the city into bondage (*mancipium*), which did not in fact differ very much from slavery despite the retention of free status. Both slaves and children could be noxally surrendered for their delicts.

This early condition, *de facto* of a normally reasonably settled and even happy existence in subjection, but of a total lack of protection by the law and theoretical liability to the master's caprice, continued for a considerable period during the Republic. The stern but just Roman character might not afford any great softening of the slave's lot, but would avoid too great a harshness. However, the gradual influx of slaves as a result of the highly successful wars of conquest in the later Republic meant that slaves became cheaper and less valued. Masters were richer and no longer worked alongside their slaves, and the vast majority of slaves ceased to be in the family circle. The great mass of them lived in pathetic conditions, sold by merciless marketers and worked pitilessly on huge estates. Some slaves, however, notably Greeks and those from Africa and the Eastern Mediterranean, displayed great economic and cultural talents, and of them some were kept in the household as teachers, secretaries or stewards, or even as companions, while others were put into positions of authority and management in trade. Indeed much of the commerce of the early centuries of the Empire was conducted by slaves and this practice again had great bearing on the law of agency.

This, however, was the enviable lot of comparatively few slaves: the majority, especially those from Gaul and elsewhere in the north, were regarded as fit only for manual work. It was not at all uncommon in the time of Horace for an ordinary citizen to possess 200 slaves. Necessarily the old domestic relations disappeared and the increase of wealth and luxury, with the resulting corruption and cruelty, led to the abuse of the master's strict rights. Under the Empire, therefore, legislation was found necessary for the protection of slaves. By a *lex Petronia* (passed some time before A.D. 79) masters were forbidden to deliver their slaves to fight with wild beasts without a magistrate's order. By an edict of Claudius and later laws, slaves whom their masters abandoned as old or infirm thereby acquired their freedom with the status of Latinity.

Hadrian introduced many rules to protect the slave from savage abuse of powers and in particular required the consent of the magistrate in all cases before death was inflicted. Where masters had been guilty of such excessive severity towards their slaves as to cause them to seek refuge in the temples or at the statues of the Emperor, Antoninus Pius required the magistrate, after an inquiry, to sell them to some more considerate person, thus, in effect, permitting slaves to seek the protection of the law; and the same Emperor finally settled that the provisions of the *lex Cornelia de sicariis* (81 B.C.), which made the killing of a *servus alienus* homicide, should be extended to meet the case of a master who killed his own slave without cause. The process begun by the pagan Emperors, probably under the influence of Stoic ideals, was carried on by the Christian Emperors and under Justinian the master was restricted to the infliction of reasonable chastisement only. But though the slave came thus to acquire immunity from being killed or grossly ill-treated, he could never personally assert such right, or any other, before the courts.

While it was recognised from quite early times that a slave might have a *peculium*, i.e. certain property or money which he was allowed to enjoy personally, the enjoyment was *de facto* merely; for the *peculium* belonged, in law, like the slave himself, to the master, who could resume possession at any moment. The slave might be authorised by his master to employ the *peculium* in trade, the profits, of course, accruing to the master. Under the Empire this *peculium* was extended to earnings made by, and gifts to, the slave, who might so acquire considerable sums, the *peculium* remaining always in strict law the property of the master. But masters do not seem to have largely exercised their right to resume possession, and we find slaves 'purchasing' their freedom from their masters with their *peculium*. On being freed, a slave took his *peculium* in the absence of express agreement to the contrary. Subject to what may be called the slave's *moral* right to his *peculium*, everything the slave acquired he acquired for his master. In the case where a slave belonged to one master by a bare legal title, to another *in bonis*, the latter alone profited. Further, if *X* was entitled merely to a usufruct (life interest) in the slave, only what the slave acquired by means of anything belonging to *X* (*ex re nostra*) or by the slave's own labour (*ex*

operis suis) belonged to *X*. Thus a legacy to the slave went to the *dominus*, not to *X*.

Despite certain regulations as to dress at various periods, it would often be very difficult to ascertain whether an individual was, in fact, a slave or a free man. It was for this reason that there were many rules in respect of errors, *e.g.* formal instruments, one of whose required number of witnesses turned out to be a slave, would still remain valid. For the same reason severe penalties were inflicted upon runaway slaves. It would be quite possible for the more privileged slaves to mix freely amid even the highest classes. The slave could do many formal acts for his master's benefit which a peregrine could not do for himself — *e.g.* make entry (*aditio*) as heir under a will or take part in a *mancipatio*.

In the later Empire the general opulence of the free population began to disappear, and, while with the added impulse of Christianity the slave's legal position was improved and more frequent manumissions greatly reduced the number of slaves, the *de facto* position of the more privileged slaves worsened. The high posts they held in business and even in State affairs were now wanted by free men who were no longer in a position to despise work.

In the eye of the law there was supposed to be no difference in the status of any slaves. In a sense this is true — a master could use his slave for any purpose he wished, and a slave sold by one master could meet with wholly different treatment from the new owner. Yet certain groups of slaves do seem to require classification separate from the rest. Two cases especially call for mention. *Servi publici* (including, to a large extent, *servi Caesaris*) had special privileges. They were those State slaves that held higher posts in the administration — not just slaves owned by the State, *e.g.* upon capture and before sale or slaves working in galleys for the State. Some *servi publici* even ranked above free men, and, besides special rules allowing and encouraging 'marriage' (the exact significance of the relationship not being clear) with free women, there existed in the later Empire the privilege of leaving half their often large *peculium* by will. The other class were *servi poenae*. These were free men or slaves convicted of the most serious offences: they were condemned for life to service in the mines or for sport in the arena; one condemned to death was *servus*

poenae till execution. A free man forfeited his property upon such condemnation (though, as time went on, his children acquired rights to such property instead of the State). His marriage and *potestas* ceased. A slave condemned was lost permanently to his master. A pardon, however, would make a formerly free man free again and *ingenuus* (freeborn), not *libertus* (freed), and, if the pardon were accompanied by a *restitutio* by public decree, he would recover his old rights as well: a *revocatio* along with the pardon of a former private slave restored the former *dominium*. The *servus poenae* is juristically important because he was not regarded as owned, even by the State. Justinian ended enslavement on condemnation for crime in A.D. 536.

(C) Enslavement

At various times there were several ways in which slavery could arise. The Romans divided them into two groups — the *ius gentium* and the *ius civile* ways. The *ius gentium* methods were those common to the whole ancient world — capture in war and birth. The distinction is a practical one because, where a *ius gentium* mode applied, the Romans recognised the enslavement of any person under a foreign law. Thus a Roman citizen (*civis*) captured by enemies in war was as much a slave as any enemy taken by the Romans, and the child of a foreigner's slave was as much a slave as that of a Roman's slave. *Ius civile* methods, however, covered only cases of Romans becoming slaves by virtue of some policy of the law, e.g. for evading military service or committing a serious crime.

Of the *ius gentium* methods, capture accounted for the vast number of slaves in the latter part of the Republic, and thereafter the numbers were kept up primarily by births, though capture still played a large role.

1. Captivitas

Anyone apprehended on national soil, who belonged to a different nation and had not the justification of a treaty or some other public reason for being there, became a slave as well as a man taken in a war with a foreign country. In strict law captives, like all booty, belonged to the State, but there

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may have been exceptions and, in any case, only a small proportion seems at any time to have remained *servi publici*. In early days they would usually be allotted to meritorious troops or sold by auction *sub hasta* (a spear being used to denote the official nature of the proceedings). Later more and more captives were sent to Rome (especially by Caesar from Gaul) and a system of marketing in the *forum* developed. Thus the vast majority of slaves ended up in private hands.

The problems of *captivitas* naturally did not affect very greatly the status of slaves belonging to Romans: once captured, an enemy was a slave and rightless, and Rome had no concern with the effect of his capture in the law of his native country. What did raise problems was the capture of a *civis* and his enslavement abroad. On capture he immediately lost his personality and all rights and capacities: he lost *potestas*; he ceased to possess (for a slave could not possess for himself) as well as to own; all relationships and institutions in which he was concerned ceased — contracts, marriage, guardianship, wills. It was in some respects as though he had died, but on death his will would operate and his contracts would continue for and against his heir; slavery, however, rendered the will *irritum* (void) and the contracts invalid.

These effects were the same whenever a *civis* was enslaved, whether by capture or otherwise. However, in the case of *captivi*, the rules came to be relaxed over the years. A *lex Cornelia* of uncertain date (perhaps of Sulla) in some way produced a *beneficium* for the captive. Either directly by the statute or by juristic interpretation of it, there arose the *fictio legis Corneliae*, whereby a captured *civis* who died in captivity was treated as having died a citizen, apparently by a relation back of death to the moment of capture. This enabled his will to operate. Facts occurring after capture appear to have been treated as happening after *death*, and entry under the will could be made as soon as death was known. Little is known of the law where the fate of the *civis* was unknown, but in such cases Justinian forbade the wife's remarriage till five years of uncertainty had elapsed.

The main qualification on the absolute character of enslavement by capture was, however, the *ius postliminii*. *Postliminium* was the act of recrossing the *limen* (threshold) or border of the State. For the *ius* to operate certain conditions had to

be fulfilled. Thus capture had to have been honourable: desertion to the enemy or flight from battle barred the right, and the soldier was expected to fight on so long as he had a weapon. Return had to be at the first available opportunity, and originally, perhaps, during the same war. Moreover, the return had to be permanent: Regulus, when he returned as bearer of Carthaginian terms, would have been no subject for the *ius*.

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The effect of *postliminium* was to restore the *civis* as far as possible to all his old rights. Normally a *civis* enslaved and then manumitted or otherwise made free was a completely new person, except for rules such as consanguinity barring marriage and for pardon of *servi poenae*. However, in *postliminium* the rule was different, although the exact operation of the restoration is much disputed. Some hold that the operation was retroactive, *i.e.* the capture was regarded as never having occurred, whilst to others the institution savours of 'suspense', *i.e.* the rights remain in suspense until either death or return. The texts give little help, and it is fair to assume that here, as so often, the Romans were not concerned with establishing any consistent theory, but tended to treat each case on its merits. Certainly, while rights were restored (or treated as not having been lost), facts were not treated as altered. Thus, while *patria potestas* and ownership were restored, even over descendants born between capture and return and over *fructus* of *res* arising in that period respectively, possession was not automatically regained, but had to be re-taken; and sometimes this necessity of taking a new possession might have disastrous effects, *e.g.* where *bona fides* had meanwhile been lost after one had innocently begun *usucapio*. Marriage was also a state of fact in Roman eyes and it could only be resumed by the mutual consent of the parties, although in the days of *manus* marriage the *manus* would presumably resurrect, perhaps separately from the marriage.

As regards facts occurring during the captivity similar latitude was shown; thus a will naming the captive as heir would operate in his favour even though the testator died during the period, and a child born then would fall into the *potestas* upon the return. As regards the captive's own acts whilst a slave, these were as void as those of any slave, except that Justinian validated codicils made in captivity.

Little is known of the fate of one who returned without fulfilling the conditions of the *ius postliminii*: presumably he remained a slave and belonged to the State. Almost certainly there was a presumption in favour of honourable capture. There existed also a similar institution where a slave owned by a Roman was captured by an enemy: when he was retaken he reverted to his original owner, and in this case the master's rights were not affected by the way in which capture had been made — *e.g.* honourably or not.

2. Birth in Slavery

A child born of a female slave was a slave, and the father's status was immaterial. The issue of a female *civis* by a male slave was on general principles free and a *civis*, though illegitimate (*spurius*). Slavery was an institution of the *ius gentium* and by that law the status of the child depended on that of the mother at the time of the birth (in contrast with the rule of the *ius civile* that where there was a valid marriage the child's status depended on that of the father at the time of conception). As a result: (a) if the woman was free at the time of parturition, whatever her status at any time during pregnancy, the child was free; and (b) if she was a slave at the time of parturition, though free during pregnancy, the child was a slave. There were exceptions to each rule, but especially to the second.

Exceptions to (a) —

(1) By the *S.C. Claudianum* of A.D. 52 cohabitation by a woman *civis* with another's slave man was prohibited. The owner of the slave could give warnings (*denuntiatio*) in certain formal terms and then, if she continued cohabitation, either claim the woman and her issue by the slave as his slaves or leave the woman free but claim the issue. This latter rule was the real exception to the general rule and it was abolished by Hadrian for its enormity; thereafter the owner had to claim the woman and the issue or neither. The whole law was abolished by Justinian.

(2) Possibly a *lex Latina*, of uncertain date and perhaps restricted in application, made the issue of a woman cohabiting with a slave a slave without any need for *denuntiatio*, but very little is known of this supposed law. It was certainly gone in later law.

(3) The Emperor Anthemius in A.D. 468 deprived of her

citizenship a *civis* who married her *libertus*, and made the children slaves of the *Fiscus*. The rule did not survive till Justinian.

Exceptions to (b) —

(1) If the child was conceived in lawful civil marriage (*ex iustis nuptiis*), then, even though the mother was enslaved before the birth, the *ius civile* overrode the *ius gentium* and the child was born free, a *civis*, and in his father's (or other ascendant's) *potestas*.

(2) The *favor libertatis*. This was a development of the classical law and after, perhaps beginning with a rescript of Hadrian; it was probably due largely to Stoic and, later, Christian influence. It accounted for various extensions of law in favour of granting liberty to children of *ancillae*. Thus it became a rule that if at any time between the conception and the birth the mother was free — for however short a period — then the child was free, and therefore freeborn (*ingenuus*) with all the advantages an *ingenuus* had over a freedman (*libertus*). This was part, and very possibly the origin, of the rule that 'a child in the womb is to be regarded as already born so far as this makes to his own advantage, but not for the advantage of others or to his own detriment'. It was, indeed, always the main application of the wider rule. The one exception seems to have arisen under the *S.C. Claudianum* where the policy of the legislation obviously excluded any general rule that might mitigate it. The *S.C.* did not, however, apply where the civil law rule as to conception *ex iustis nuptiis* operated, for that would have meant robbing a maybe innocent husband of his *potestas*.

Once the *favor* was established, all sorts of extensions arose, mostly reasonable, but one or two perhaps questionable. Thus if a slave woman were freed conditionally by will (*statulibera*), then even though she never became free because of some subsequent enslaving factor, such as condemnation as *serva poenae*, a child conceived whilst she was *statulibera* would be born free if the condition had been fulfilled before birth. Again, where a child was born before the heir entered and the mother was freed by the will, the child would be free if the heir's delay in entry was culpable. Similar rules applied where the mother was to be freed under a *fideicommissum* ('trust') in a will and the *fiduciarius* ('trustee') fraudulently delayed.

In some of the cases the child was *ingenuus*, in others the mother, when freed, had the right to demand the handing over of the child for her to manumit. Justinian provided that where a will was prevented from operating till after an inquiry into its validity, a child born in the meanwhile of an *ancilla* to be freed by the will was *ingenuus* if the will was upheld. Justinian also settled that a gift of freedom by will to an unborn child was valid even if the mother was not freed. Earlier it had been accepted that, where a manumission would only be valid after a case had been shown to a *consilium* (e.g. under the *lex Aelia Sentia*, *post* p. 82), a child born meantime would be free if the *consilium* upheld the manumission.

(3) Until Vespasian abolished the rule it appears that the *lex Latina* referred to also made *ingenuus* the son of an *ancilla* by a *civis* who thought her free.

(4) Justinian apparently made *ingenui* the children of an *ancilla* who had been the permanent concubine of her master till his death.

3. Civil Law Methods

These were mainly cases of state policy protecting the interests of either the State or a privileged class. In the early days the enslavement would normally be effected by sale *trans Tiberim*, sale of a *civis* within the city being regarded as inelegant. Among the reasons for slavery were: (a) *furtum manifestum*, being caught in the act of stealing, in early law; (b) evasion of tax or of military service — e.g. by evading the *census* — again in early law; (c) non-payment of debts after judgment and other formalities, also in early law; (d) the *S.C. Claudianum* (*ante*, p. 76) to punish women cohabiting with slaves.

Peregrini dediticii (*post*, p. 94) who returned to within 100 miles of Rome were automatically and permanently re-enslaved by virtue of the *lex Aelia Sentia*. *Condemnatio* for certain crimes also made the criminal a *servus poenae* automatically. *Coloni* (serfs) who ran away (*fugitivi*) may have been enslaved in the late Empire.

In early law a *paterfamilias* had power to sell his child *trans Tiberim*, but this vanished long before the Empire, even before his power to put the child to death. However, in the later Empire poor parents were allowed to sell newly born

children into slavery, but only with certain formalities and always with a perpetual right of redemption.

There were two further cases. The freedman who committed a serious act of ingratitude (*libertus ingratus*) against a master who freed him voluntarily was liable under Justinian, at any rate, to be re-enslaved. In the classical law, however, such acts may not have been so punished other than exceptionally, there being various different penalties for each type of act. The other case was that of the *civis* over twenty years in age who fraudulently allowed himself to be sold to obtain a share in the price. Under Justinian he was probably fully enslaved, but in classical law he may just have been 'estopped' from bringing a *proclamatio ad libertatem* to assert his freedom (which, of course, was not very different from enslavement as far as he was concerned, but others might be differently affected, e.g. children). In any case it seems that repayment of the price restored the liberty or the *proclamatio*.

The State's interest in slavery is also clearly shown in the law of manumission.

(D) Manumission and other Release from Slavery

Manumissio was a unilateral act on the part of the *dominus* which freed the slave. The term was also used, e.g., where a free man held in bondage (*in mancipio*) was released. The State always had some control over manumission because of the effect on the economy of the nation and the danger of a mass of poor and unreliable *libertini*. Thus in the early days the three methods all involved a public ceremony and probably, originally, public consent. *Manumissio vindicta* involved a declaration by a magistrate (the praetor) in the presence of the slave and of the master to the effect that the slave was a freeman; it was almost certainly a collusive lawsuit in origin, a use of the *legis actio per sacramentum* on an *adsertio libertatis* (a claim of freedom), with the praetor's lictor acting as *adsertor* for the slave and using the ceremonial wand (*vindicta*) in the process; it would need the praetor's consent, could not be conditional or suspended in operation and was probably (but not certainly) a variation of *cessio in iure*. *Manumissio censu* again involved a magistrate, this time the censor, who, on a claim by the slave to be enrolled on the census as a *civis* and

with the consent of the master, could so enrol and free the slave ; it too would involve the magistrate's consent and could not be conditional or suspended ; it was mainly used in the Republic and became obsolete in the early Empire along with the *census*. The third form of *manumissio* was by will (*testamento*). Probably this would originally involve the consent of the *populus*, the first form of will being that *in comitiis calatis*. Later the will would just have to be witnessed by the requisite number of citizens. A clear imperative form of words (e.g. 'let Titius be free' or 'I order Titius to be free') was necessary, and the testator had to be full civil law owner of the slave at the time of making the will, at death and throughout the meantime. In the course of time relaxations were allowed and even ambiguous expressions tended to be interpreted in favour of freedom. Justinian, finally, allowed implied manumission by will, e.g. by naming the slave as heir or as a *tutor* : previously such a nomination was void without a previous express manumission. The manumission could be conditional or suspended in operation (e.g. 'when Balbus shall die'), and the slave was meanwhile *statuliber* and received special protection though still a slave. Certain restrictions lay on freedom to manumit in special cases. Thus whilst *tutela mulierum* lasted, a woman could manumit only with her tutor's authority ; and a slave owned by more than one master could not be freed except by the act of all until Justinian provided that any one master could free if he compensated the others for their loss.

All three methods operated at civil law and made the slave free and a *civis*, but only the *dominus* — the Quiritary owner — could perform them. Towards the end of the Republic, however, the praetor intervened in two types of case to protect a slave whom the master had shown a clear intent to free. The first case was where the master held the slave only *in bonis* (i.e. only by a praetorian title, *post*, p. 162). The second was where modes less formal than the three civil methods were employed. Two main modes were (i) *inter amicos*, which may have meant a declaration of freedom in front of witnesses informally present or else any clear act showing that the master treated the slave as a friend, not a slave, and (ii) *per epistolam*, a declaration in a letter to the slave. From the former came the forms *in convivio* (by summoning the slave as a guest to a

party with friends) and, in Christian times, *in ecclesia* (by declaration before a congregation in church); under Constantine this latter form came to give full citizenship if a set form was used and an instrument in writing executed. It is probable that in these praetorian modes no special forms were required, intent to free always dominating. A *dominus* unable to use the civil forms (*e.g.* a deaf-mute) could employ the praetorian methods. The praetor had no power to make a slave a free man and a *civis*. However, he did ensure that the slave enjoyed *de facto* freedom while he lived: the slave was said to be '*in libertate tuitione praetoris*' (enjoying freedom under the praetor's protection). The status really meant only that the praetor would protect the slave from being punished or ill-used by the master and from having to work for the master or giving his earnings to him. Legally, however, he was still a slave and had no rights; he could not marry; children begotten would be slaves (if the mother was a slave, of course); and all property would revert to the master on the slave's death.

The unsatisfactory state of the law of manumission, with the growing tendency for the improvident release of slaves unfit for freedom and the ever-growing mass of destitute and often worthless *libertini*, together with the unedifying *de facto* status of '*in libertate*', led to legislation in the time of Augustus. That Emperor used the legislation on this head to further another policy of his, that of trying to prevent the disastrous decay in family life and to reverse the decline in the citizen birth-rate. The principal legislation was: (i) *lex Iunia* (date uncertain); (ii) *lex Fufia Caninia* (2 B.C.); and (iii) *lex Aelia Sentia* (A.D. 4).

(i) The *lex Iunia* provided a new status, a legal one, for those *in libertate* — the status of Junian Latins (*post*, p. 91).

(ii) The *lex Fufia* laid down restrictions on the numbers a master could free *by will* — to prevent the practice of wholesale manumissions to swell the numbers of mourners at the funeral. Thus a master with one or two slaves could free one or both; one with between 2 and 10, up to half of the number; one with between 11 and 30, up to one-third; one with between 31 and 100, up to a quarter; one with between 101 and 500, up to a fifth; one with more than 500, no more than 100. Absurdity was evaded by allowing a master to manumit

up to the number of the permitted fraction of the group below if that number were greater than the fraction of the actual number (*e.g.* a master with twelve slaves could manumit five of them as if there were only ten; otherwise he would have been able to free only four). Numerous laws, especially *senatusconsulta*, were passed to prevent evasions. The slaves freed had to be clearly named and those first named were free if too many were set down: the ingenious device of putting the names in a circle so that there should be no order was rudely met by the law's refusal to treat any as freed! The *lex* did not affect manumissions *inter vivos*.

(iii) The *lex Aelia Sentia* dealt with several mischiefs.

(a) It made *void* completely any manumission of any slave by a master under twenty unless done *vindicta* with the consent of a *consilium* for cause shown. The *consilium* was a body of prominent citizens, *e.g.* five senators and five *equites* in Rome itself. The *causa* might be, *e.g.*, blood or foster relationship with the slave or a signal service performed by the slave for the master. The provision covered manumissions *inter vivos* and by will — even by the usually privileged soldier's will. Subsequent legislation prevented evasion, *e.g.* by selling the slave to another to manumit or by imposing a condition or *fideicommissum* in a will.

(b) It provided that any slave under thirty years of age could be formally manumitted by will or *inter vivos* only for sufficient cause shown to a *consilium*, otherwise the slave became only a Junian Latin, not a *civis*. It was aimed at preventing too many young and irresponsible freedmen.

(c) It made manumissions in fraud of creditors void, again whether by will or *inter vivos*.

(d) Certain criminous and other degraded slaves were made incapable of becoming more than *peregrini dediticii* upon manumission (*post*, p. 94).

According to Justinian the *lex Iunia* was a *lex Iunia Norbana*, which would date it in A.D. 19. However, there is no other text to this effect, and it seems much more probable that the statute was earlier than the *lex Aelia Sentia*: it seems unlikely that the latter would use the praetorian 'status' of '*in libertate*', but otherwise Junian Latinity would have to have been already in existence. The incidents of Latinity will be discussed in respect of nationality.

Under Justinian simplifications were made. All manumissions conferred full citizenship, the lesser statuses being abolished. The *lex Fufia* was totally repealed, and the *lex Aelia Sentia* as regards slaves under thirty and *dediticii*. Masters under twenty could still manumit only with the consent of a *consilium*, but there were one or two slight relaxations of the rule. The forms of manumission basically remained. *Vindicta* was now a mainly informal act before a magistrate. The form *in ecclesia* continued as before, but the formerly informal modes *inter amicos* and *per epistolam* now normally needed writing with five witnesses. Any indication of intent to manumit sufficed in a will, even if the freeing preceded the institution of the heir, which previously invalidated the manumission.

Besides these forms of manumission a master could free his slave indirectly by inducing another to manumit. This was frequent in wills either by making the gift to an heir dependent on manumission or, after Augustus, by imposing a *fideicommissum* on a beneficiary under the will. The effect of the indirect method was to make the actual manumitter *patronus* of the freedman with rights and duties in respect of him — the manumitter might also become *tutor* if the *libertus* were young. If the manumission were direct the slave would become *libertus orcinus* (*i.e.* of the dead man) and so have no patron.

In addition to manumission a slave could become free without the need for his master's consent in various cases. The most obvious case is *postliminium*. Moreover, the State would often free a slave or give him Latinity either as a reward to the slave (*e.g.* for denouncing certain criminals) or as a penalty to the master (*e.g.* for abandoning a sick or old slave). Finally, the newborn child sold into slavery could be redeemed by his parents without need for manumission.

(E) Quasi-Servile Conditions

There were several situations in which a man was in fact very much in the position of a slave: in some of them he was juristically a slave, in others a free man. The various cases have little in common. Some of the more important cases, *e.g.* freedmen and Latins, will be more conveniently dealt with under Nationality.

1. *Statuliberi*

These were, as already seen, slaves made free by will subject to a condition or a postponement in time. Until the fulfilment of the condition or the elapsing of time they remained slaves, normally belonging to the heir. They were protected from harsh treatment, *e.g.* torture as witnesses, and were for some purposes, *e.g.* the criminal law, even treated as free. They could be sold, subject to restrictions against harsher treatment than they had been receiving, but the condition still operated to free them. Prescription by *usucapio* (*post*, p. 201) did not exclude the operation of the condition. If the condition was not fulfilled, they of course reverted to full slavery. The child of a *statulibera* was a slave if born before the fulfilment of the condition.

2. *Servi sub usufructu manumissi*

Where a usufruct existed and the dominus freed the slave by will, the slave remained a *servus* until the end of the usufruct, though he was now a slave without an owner and, indeed, his former master's *libertus*. Manumission *vindicta* would be inoperative without the usufructuary's consent because effect could not be postponed; perhaps the ceremony might have been regarded as an informal manumission, making the slave a Latin at the end of the usufruct.

Under Justinian manumission by the *dominus* with the usufructuary's consent was fully effective, making the slave a *civis*. Manumission without such consent also made the slave free and a *civis*, but he had to perform those duties that would be owing to the usufructuary whilst the usufruct lasted. Manumission by the usufructuary without the owner's consent did not affect the slave's status, except that the slave was protected from the master's control for as long as the usufruct would have lasted.

3. *Bona fide servientes*

The name is misleading: the *bona fides* concerned was that of the supposed master, not of his supposed slave. It would be rare for a free man to act as a slave other than *bona fide*, and in any case the rules concerned with his acquisitions would be the same whatever his state of mind. The *bona fide* possessor of a free man (or, for that matter, another man's slave) was entitled very much as was a usufructuary, *i.e.* to whatever the *serviens*

acquired from his own labours during the possession and from the use of the possessor's own property. All other property had to be handed over to the *serviens* (or to his master, were he another's slave) when the mistake was discovered.

4. *Auctorati*

These were free men who were professional gladiators and attached by a formal contract of hire to a gladiator-master (*lanista*). Though free, they could be stolen by being enticed away.

5. *Redempti*

Free persons captured in war might be ransomed, and where the ransom was not a close relative he had a kind of extensive lien over the ex-captive till the ransom money was refunded. The *redemptus* was not exactly a slave nor yet a free man: the full effect of *postliminium* was postponed till payment. Thus he could not marry, but he could receive a legacy or inheritance in his own right and thus pay off the debt. The child born of a *redempta* was apparently *ingenuus*, though perhaps at one time subject to the lien also.

6. *Iudicati, damnati, nexi*

In early law the *legis actio per manus iniunctionem* lay for enforcement by a kind of arrest against a judgment debtor (*iudicatus*), a person put under special liability by various statutes (*damnatus*), and a debtor under an ancient formal contract, known as *nexum* (*nexus*). Under the process the debtor could be adjudged (*addictus*) by the praetor to the creditor, who, at the end of sixty days and after certain formalities, had the right to sell him into slavery *trans Tiberim*. In the meanwhile the *addictus* was still a free man and able to make a contract of settlement with the creditor, but was in fact very like a slave, being in a severe state of bondage. An *addictus*, though free, could be the object of theft. The institution died out as the law developed.

7. *Persons in mancipii causa*

A *paterfamilias* could use the formal conveyance *mancipatio* (*post*, p. 192) to put any descendant in his power into the power of another. The descendant was said to be *in mancipio* (or *in*

mancipii causa) and remained a free citizen, but he was in a state very similar to that of a slave (*servi loco*). In ancient law the status arose where a *paterfamilias* sold his descendant within the city of Rome, but the practice gradually died out during the Republic. Thereafter it remained as a real status with full effect only in the case of *noxae deditio*: where a descendant (in the developed law, only a male one) had committed a delict, his *paterfamilias* could hand him over instead of paying damages and the plaintiff would hold the descendant *in mancipio* until the damages were satisfied by his labours. Otherwise the status survived only as a part of the ceremonies of *emancipatio* (*post*, p. 127) and *adoptio* (*post*, p. 114), and there, of course, it was purely formal and fictitious.

The 'bondsman' differed from the slave in that: (i) he retained his full civil rights, though in a latent form; (ii) on manumission he was not a *libertus*, but remained an *ingenuus*; (iii) neither the *lex Aelia Sentia* nor the *lex Fufia* restricted his manumission; (iv) if his holder treated him insultingly, the bondsman had an *actio iniuriarum* against him; (v) although he was, like a slave, a *necessarius heres* if instituted in his holder's will, he had a *ius abstinendi* in the developed law (*post*, p. 255); (vi) he may have retained some of his public rights.

On the other hand he was like a slave in that: (i) he was under similar incapacities as to entering and incurring obligations; (ii) his acquisitions accrued to his holder; (iii) any child born during *mancipium* was perhaps *in mancipio* originally but not in classical law; (iv) he could be transferred by his holder into bondage to another; (v) he could be stolen, although free, and also could be recovered by the real action, *vindicatio*; (vi) his status ended by manumission in the same forms as for a slave, even *censu*; (vii) he could be made *necessarius heres* by his holder.

When Justinian abolished noxal surrender of *filiifamiliarum* and simplified the forms of adoption and emancipation, the status of *mancipii causa* disappeared.

8. *Coloni adscripti glebae*

A *colonus* was an ordinary tenant holding agricultural land at a rent under a contract of hire (*locatio conductio*). As such he was just an ordinary citizen not of sufficient wealth to be a land-owner. In the late Republic and early Empire most land would

be farmed by slaves on the huge estates, although *coloni* were not uncommon. However, in the later Empire slaves became less numerous and more and more free men were given leases of rural land. Under the influence probably of Greek and other oriental institutions there gradually emerged a class of *coloni* who were exceptionally depressed in condition. These were said to be tied to the land (*adscripti glebae*) and they were, in fact, those tenants who were to be the serfs of mediaeval Europe. There were large numbers of them in the vast estates of the late Empire, and they gradually came to have a definite, very lowly status. They were still *cives* and thus could marry and contract, but their position vis-à-vis their landlord was practically servile. They could sue him only to dispute their status towards him and any rise in rent unjustified by custom or for a serious crime. It was an offence for them to run away, and they could not assign their 'interest' without the lord's consent. One could become such a *colonus* by agreement with the lord, *e.g.* under pressure of debt, or by birth from a *colona*, or by being publicly assigned as such to a lord for vagrancy, or even by prescription by acting as a *colonus* for thirty years. There were considerable variations in the legal conditions of *coloni*, some being relatively free, others virtually slaves.

II

Nationality

(A) *Civitas*

To the Romans *libertas* almost implied *civitas* for most purposes. Thus it was that at *ius civile* manumission, when effective, gave *civitas*, and this liberality to freedmen during the Republic was accounted by non-Romans as a major source of Roman strength. Originally, as already seen (*ante*, pp. 3, 18), the citizen body was divided into patricians and plebeians and this division had great importance in private law. Later class distinctions had great social, economic and political importance, Rome always being very aristocratic in complexion, with the senatorial class and the *equites* forming the nobility in the early Empire. However, in the developed private law the

major distinction was between *ingenui* (freeborn) and *libertini* (freedmen). Freedmen came to be called *libertini* as far as their general capacity was concerned, but *liberti* vis-à-vis their relations with their manumissor (*patronus*) — nomenclature, however, was never consistent.

The *libertinus* suffered various general disabilities at various times. Under the Empire he could not be a senator or magistrate. Originally, he could not marry an *ingenua*: in the Empire, he could marry anyone but a member of the senatorial class, until Justinian abolished the restriction. More important, however, was his position as *libertus* of his patron. The relationship gave rise to various obligations, particularly upon the *libertus*, but some also on the patron. These obligations were grouped into three classes.

(i) *Bona*. The patron had a civil law right of intestate succession if the *libertus* left no *sui heredes*. Following praetorian innovations he also achieved certain rights as against the will of the *libertus* (*post*, p. 297). The right to *bona* was given by the Twelve Tables and, as a result, the patron was *tutor legitimus* to a *libertus impubes* (*post*, p. 130).

(ii) *Obsequium*. A *libertus* was bound to treat his patron with respect, and various customary rules evolved to exemplify the measure of respect. Thus the *libertus* could never sue his patron without a magistrate's consent, and never at all on an action involving discredit for the defendant. He was bound to assist the patron or his family if any of them fell on evil days, and he could not give evidence against his patron in a criminal trial. Gifts from the patron to him were revocable. A breach of the necessary respect made the freedman *ingratus* and subject to various heavy penalties, ultimately including even re-enslavement. The patron had obligations for his part towards the *libertus*, e.g. to help him in hard times and, in classical law, not to give evidence against him.

(iii) *Operae* and *Munera*. These were definite services agreed upon at manumission and certain small periodic gifts also agreed upon then. The *operae* were much the more important and had considerable economic value. They would vary according to agreement and the skill and strength of the slave.

These rights of the patron could be lost by his own act, e.g. if without justification he brought a capital charge against the

freedman or treated him as still a slave. The Emperor could by decree (*restitutio natalium*) put the *libertinus* in the position of an *ingenuus* both as regards his patron and as regards rights under public law; this decree would, however, not normally be given without the patron's consent. The Emperor could also make a grant of the right to wear a gold ring (*ius anulei aurei*) — the mark of *ingenuitas*: this would have the effect of removing public disabilities without affecting the patron's rights.

Similar in general outline to the patron-freedman relationship was the ancient one between patron and client. It originated with the practice of some plebeians of attaching themselves to patricians and involved respect and services and mutual aid. The sanctions were primarily of a religious nature, and the institution continued on into the late Republic and Empire as a strong social force without legal sanctions, lesser citizens often attaching themselves as clients to the more distinguished.

Certain citizens came under severe disabilities as a consequence of disreputable conduct. In the Republic the censors had wide discretion to put a mark (*nota*) against a name on the *census* and this involved great social disgrace. The praetor adopted a similar practice, listing persons who would be put under severe procedural bars, *e.g.* could not appear as an advocate nor litigate by an agent or as an agent. In particular, condemnation in certain actions (later called *actiones famosae*) imposed such disabilities. Gradually the idea was taken up by legislation and the concept of *infamia* developed, especially in later law. Besides the procedural disadvantages the *infames* could not hold public office and suffered other political detriments as well as social. In addition to the class of *infames* was another involving disabilities for discreditable activities and dating from the Twelve Tables: these were the *intestabiles* who were disqualified from acting as witnesses in lawsuits or in formal transactions, *e.g.* wills or mancipations. In later classical law they appear to have been unable to make a will. It was quite possible to be both *infamis* and *intestabilis*.

Civitas could be gained in various ways, but the main method was, of course, birth from a Roman mother where the *ius gentium* applied or conception through a Roman father where the *ius civile* applied — *i.e.* where there was *iustae nuptiae*. On general principles, even if the father were a slave, the child of a Roman woman would be a *civis*, though, of course,

illegitimate (*spurius*). A *lex Minicia* of the later Republic made a change in the general rules : where a *civis* married a peregrine without *conubium*, the issue of the marriage (necessarily only a *ius gentium* union) should always be a peregrine. This changed the operation of the *ius gentium* where a female *civis* married a *peregrinus* — previously such a child would have been a *civis*. The *lex* did not apply, it seems, to marriages between *cives* and Junian Latins.

Civitas was frequently given to persons as rewards for service to Rome, and also to cities and areas specially privileged (e.g. Tarsus, whereby Saint Paul was a Roman citizen). *Civitas* was, of course, also gained by formal manumission, and there existed a number of ways open to Junian Latins to become *cives*.

(B) *Latinitas*

A Latin was originally an inhabitant of Latium, the part of Italy around Rome. Such a man was never regarded as a peregrine and seems always to have had a privileged position till the dissolution of the Latin League in 338 B.C. He had *commercium* and *conubium*, and, if resident in Rome, even the right to vote in the Comitia Tributa. There were also means whereby he could change his nationality to Roman. These Latins, known subsequently as *prisci* or *veteres*, disappeared as an entity when soon after 338 they achieved Roman citizenship.

The idea of *Latinitas*, with its convenient position between *civitas* and alienage, appealed to the Roman mind and much use was made of it for later institutions. One of the main reasons for the gradual conquest of Italy by Rome was the practice of establishing *coloniae* at key strategic positions ; originally these would be relatively small garrisons of Roman citizens, mostly soldiers ; later they became townships as well as garrisons and were often peopled by Latins as well as Romans. The original colonists retained their *civitas*, but from the mid-Republic it became normal to confer on the *coloniae* some measure of self-government and at the same time to give the colonists the status of *Latinitas*. These colonies would vary considerably according to the legislation founding them. Normally the chief magistrates would have *civitas*, and in some cases the 'town-councillors' also. The ordinary *Latinus colonarius* would not have *ius conubii* and the *lex Minicia* would apply to his marriage

with a Roman. He did, however, have at least a measure of *commercium*, and he had, of course, all his rights under his own municipal law. In 88 B.C., following the Social War, citizenship was given to all Italy south of the Po, but *coloniae* still existed and continued to be made, and *Latinitas* was often conferred on areas and communities in the Provinces (e.g. Italy north of the Po in 89 B.C.). The status of coloniary Latin continued until the Constitution of Caracalla in A.D. 212 extended citizenship to nearly all free persons within the Empire.

The idea of Latinity was again employed in the early Empire when the *lex Iunia* created a new status for certain ex-slaves (*ante*, p. 81). As the Empire went on, more and more sources of this Junian Latinity arose beyond the cases of former praetorian protection and the *lex Aelia Sentia* — often Latinity was conferred as a reward for a slave. In A.D. 212 all existing Junian Latins were apparently given full citizenship along with the *coloniarii* and others. However, the sources of Junian Latinity were not ended by the edict, and, indeed, new sources were introduced thereafter (e.g. by Constantine), but it now meant that the only Latins were the Junian ones and they came to be called '*Latini*' simply. The status continued until Justinian abolished it.

A Junian Latin was in a condition worse than a *coloniarius* in that he belonged to no community and thus had no municipal law. He had no true *conubium*, although his marriage (which would be *iure gentium*) was not affected by the *lex Minicia*. His *commercium* was greatly restricted in respect of will-making — *testamenti factio*: he could not make a will at all, nor could he be made a *tutor* by one. Moreover, although he could be validly made heir or legatee under a will, he had no capacity to accept (*ius capiendi*) whilst he remained a Latin: if he became a *civis* within the necessary time he acquired that capacity because the institution or legacy was valid in itself. (He could, however, take property under a *fideicommissum*.) More importantly still, when he died, he died a slave and all his property went as *peculium* to his patron or to the latter's heirs — his own children received nothing. In addition, he owed the various duties of a *libertus* to his patron. All in all the status must have been well-nigh intolerable for any but the most spineless of ex-slaves, and Augustus and his successors used this pressure to further various of their policies. A large

number of avenues were opened to the Junian Latins whereby *civitas* could be achieved. Several were of great importance.

(i) *Iteratio*. This involved a repetition of the manumission, this time without the previous defects. Thus a slave under thirty, freed without the consent of a *consilium*, could be formally manumitted again by his patron when he reached thirty. Where a holder *in bonis* manumitted, *iteratio* would have to be performed by the Quiritary owner: this would make the freedman technically the *libertus* of the latter (who would, indeed, be the *tutor* were the *libertus impubes*), but all the economic advantages (*bona*, and later *operae* and *munera*) were vested in the holder *in bonis*.

(ii) *Anniculi probatio*. Under the *lex Aelia Sentia* a Junian Latin who married a *civis* or a Latin (Junian or colonial) could attain *civitas* for himself (and for such of his family as were not *cives* already) by proving to the magistrate that he was married with the required formalities (e.g. before seven witnesses with the *probatio* in mind) and that the marriage had produced a child that had reached the age of one year. Besides obtaining citizenship the qualifying Latin was also given *patria potestas* over the child and any other children. There were also liberal provisions enabling the mother and, in some cases, the child, to make the *probatio* if the Latin had died before it could be made, and in such cases the effect was so far retrospective as to enable the child to inherit its father's *bona* instead of the patron. The child could be male or female. The *lex* only applied in the case of Latins who had been manumitted under thirty without consent of the *consilium*; the benefit of *probatio* was, however, extended to all Junian Latins by the *S.C. Puspio-Pegasianum* of A.D. 72.

(iii) *Erroris causae probatio*. Mistake as to status was remarkably common in Roman society and numerous rules were developed to meet hard cases. Various *senatusconsulta* dealt with such mistakes occurring upon marriage and granted *civitas* to the mistaken party and his family if the error was not unreasonable. Like *anniculi probatio*, which no doubt formed the pattern, these various reliefs were introduced as part of the imperial programme to raise the birth-rate, and the first case for relief was a direct extension of *anniculi probatio* and concerned only Junian Latins; the other two cases were aimed at benefiting mistaken *cives*.

(a) Where one party to a marriage intended to avail himself or herself of the benefit of the *lex Aelia* but made a mistake as to the spouse's status (e.g. mistook a peregrine for a *civis* or Latin), he or she could proceed as with *anniculi probatio*, producing the year-old child, but also proving the error.

(b) Wherever a *civis* mistook the other spouse for a *civis* and thus the marriage would not be *iustae nuptiae*, he or she could prove the error as soon as a child was born of the marriage.

(c) If a *civis* thought himself a peregrine or Latin and married under that assumption, he too could prove the error upon the birth of a child.

It is noticeable that in the latter two cases the birth of a child was enough: it did not have to be a year old. The general effect of the *probatio* was to give *civitas* to all the parties concerned, even to the other spouse who might not have shared the mistake. However, *civitas* could never be given to a *peregrinus dediticius* by this method, but the other members of the family could be made citizens despite that defect in one spouse. Normally *potestas* would also be conferred, but there were complexities, as also where a woman proved the error.

(iv) Other methods. The grant of citizenship was often made by legislation during the Empire to reward Junian Latins for various meritorious achievements. Thus the Latin who served six years in the *vigiles* in Rome, or ran a mill with a certain output for three years or a corn-ship carrying a certain cargo of corn to Rome regularly for six years, or after the great fire of Nero's reign built a house in Rome, spending half at least of his large fortune upon it, could gain citizenship — so could a *Latina* who bore three children. However, all these methods had one serious handicap in contrast with the three major ones: they did not affect the patron's rights in the Latin's property, unless the patron consented to the grant of *civitas*. This was a very severe disability, for it meant that the ex-slave still died more or less a slave. Hadrian, however, allowed him to perfect his position by resorting to *anniculi probatio*.

(C) Alienage

All who were not *cives* or Latins were *peregrini*. Whilst some individuals and communities received the privilege of

the *ius commercii* or the *ius conubii* (or both) and thus could take part in *ius civile* transactions (e.g. wills and mancipations) and marriages, the vast majority had no such rights and could rely only on the non-civil law rules of Roman law — which thereby came to be classed as *ius gentium*. As Rome expanded in the mid-Republic peregrines became more and more catered for in the law. Most importantly of all, the Roman law of contracts, upon which trade depended, was almost entirely developed as a law open to all who entered into the relevant contracts. The protection of treaties and the jurisdiction of the peregrine praetor induced many peregrines to come to Rome. Moreover, as Rome spread, her earlier policy of conferring *civitas* fairly readily upon conquered communities (in order to impose the civic duties such as military service upon them) was abandoned and many of her subjects, euphemistically called allies (*socii*), remained peregrines. It was at this period (the later Republic) that *civitas* was a real benefit and was hard to obtain. After the Social War (91–88 B.C.) *civitas* was given to all Italy, but most of the Empire outside Italy remained peopled by peregrines under Roman control. Not until citizenship became burdensome again with increasing taxation was the number of peregrines greatly diminished. Then in A.D. 212 Caracalla converted nearly all peregrines (except *dediticii*) and Latins into citizens, and thereafter peregrines became less and less important, especially from the viewpoint of private law. As it was, *peregrini* played but small and mainly incidental roles in the Institutes of Gaius: for the central body of Roman private law they made little difference, mainly because, as said already, contracts were almost entirely *iure gentium*. It is only with mistakes of status, marriage with Romans, exclusion from benefits under Roman wills, and fictions to enable them to sue and be sued that the law has much concern for peregrines.

Peregrines were not all treated alike by Rome. Thus *socii* had much greater constitutional and legal rights than those who had surrendered unconditionally after defeat (*peregrini dediticii*). This unfavourable status occurred most frequently in the Republic and tended to die out fairly soon in the Empire. However, as with *Latinitas*, the convenience of the status appealed to the Roman legislators and it was employed for a class of persons very different from the original

dediticii. The *lex Aelia Sentia* put certain manumitted slaves into this class (*in numero dediticiorum*). These ex-slaves included those who had fought in the arena or had been *servi poenae*. They were worse off even than Junian Latins. Like the latter their property went to their patron upon death and they had no municipal law (as other peregrines and colonialy Latins would have). Unlike the Latins, however, they could never become citizens and they had to live more than 100 miles from Rome on pain of perpetual re-enslavement if they returned. Though free, they had neither *conubium* nor *commercium*. Caracalla's edict did not apply to them, but gradually in the later Empire with the suppression of gladiatorial contests and the mitigation of criminal punishments the status disappeared and it was abolished *pro forma* by Justinian.

Under the Republic a citizen convicted of serious crime was often sent into exile (*interdictio aqua et igni*): he did not lose citizenship, but could be put to death if he returned without pardon. Tiberius, however, made such *interdictio* carry with it loss of citizenship and the institution gave way to an innovation of Augustus, *deportatio*. This was banishment with loss of *civitas*, the offender (*e.g.* the poet, Ovid) becoming a peregrine without any municipal law and usually suffering forfeiture as well. The institution continued under Justinian.

III

Familia

He who had *civitas* necessarily had *familia* also. A *civis* had to belong to a *familia* even if he were its only member. Though he might change his *familia*, he could never become without one except by losing *civitas*. *Familia* is a difficult word to translate: it lies between 'family' and 'household' (and the latter word is probably the less dangerous rendering); it depends upon a social system considerably different from those of modern Europe. Moreover, it did not always retain its strictest sense, even in legal texts. Thus for many purposes persons *in mancipii causa* and also slaves were treated as part of the *familia* of another, and the terms *potestas* and *alieni iuris*

are constantly extended to them. However, whilst they form part of another man's *familia*, those in *mancipio* retain their own *familia*, albeit in a dormant state, and slaves have no *familia* at all — using the term here in the strict sense of the status of a *civis* as an individual.

The idea of *familia* rests primarily upon the Roman system of legal relationship known as *agnatio*. The modern conception of kinship would have been described by the Romans as *cognatio*. It is the natural tie of *blood*. A man is 'related' to his brother, his sister, father, aunt, cousin and so on, by this bond and no other, and perhaps its most important *legal* result is that the relationship may give rise to certain rights of succession on the death of such relative without leaving a valid will. At Rome, the relationship which the law recognised and, at first, exclusively recognised, was that which the Romans expressed by the term *agnatio*: a man's legal relatives were not his 'cognates' as such, but his 'agnates'.

Roman private law was based upon the idea that each family had a head; the head being the eldest living male ancestor. In his *potestas* were all his descendants through males; so that if the great-grandfather happened to be alive, a grandfather of sixty was as much a *filiusfamilias*, and as much subject to the control called *patria potestas*, as the youngest infant in the family in question. All persons subject to the *potestas* were *agnati* to each other, and they so remained even after the common ancestor had died. Since the only person who could exercise *potestas* was a male, and since most people were under *potestas* because born in *potestas*, the writers of the Institutes define agnates as 'cognates related through persons of the male sex, that is, through their respective fathers', but this definition is inaccurate because, although *agnati* were primarily *cognati* traced through males, the agnatic household might be *artificially* diminished or increased. It would be diminished by the marriage *cum manu* of a daughter into another family, by the release (emancipation) by the ancestor of any descendant in power, and by the ancestor's giving a descendant into another family by adoption. Conversely, it would be increased by the accession of a woman who married *cum manu* into the family, and of a stranger brought into it by adoption or adrogation. Agnates, therefore, may be particu-

larly described as (a) 'blood relations' (*cognati*), traced solely through males, excluding such cognates as had left the family by emancipation or otherwise, and (b) such persons, unrelated by blood, as had been brought artificially into the family. The test of agnation was therefore subjection to a common *patria potestas*; those were agnates who were under the same *potestas* or who would have been so had the common head of the family been still alive.

A male or female *civis* who was not under the power of another was said to be *sui iuris*; one under such power, *alieni iuris*. The term *paterfamilias* was applied to every male who was *sui iuris*, irrespective of age and whether he had or had not any children in power. No female could be the head of a Roman family or exercise *patria potestas*. The term *materfamilias* strictly applied only to the wife held *in manu*, but it was sometimes used loosely to mean a wife not *in manu* (even though she was technically not in the *familia*) and even a single woman *sui iuris*. Any male descendant in power was called *filiusfamilias*, any female *filiafamilias*. Children of the half-blood were agnates to each other provided their common parent was the father.

Besides the notion of *potestas* it was often necessary to discover the nearest agnate to an individual, *e.g.* in the law of guardianship and of succession on death. The principle of *agnatio* had its widest extent in the ancient institution of the *gens* or clan. In the early Republic the *gens* was a most important political and legal unit, but in time it became little more than a matter of social prestige — the Roman derived his *nomen* or central name from his *gens* (*e.g.* Q. Fabius Maximus of the Fabian *gens*). The influence of the *gens* on private law disappeared quite early in Roman law.

A *civis* who was *sui iuris* would be able to take advantage of, and be subject to, all the rules of Roman law — *ius civile* and *ius gentium* — unless he was under one of the recognised disabilities which necessitated his having a guardian. It is, therefore, only the condition of those *alieni iuris* and that of those requiring guardianship that require further attention in the law of persons. This will call for a discussion of *patria potestas* (and the old institution of *manus* over wives), which will in turn necessitate a discussion of the Roman laws as to marriage, and of *tutela* and *cura*.

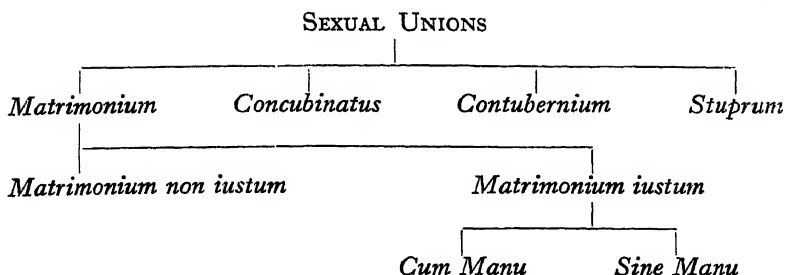
(A) *Patria Potestas*

This was the power that a *paterfamilias* had over his descendants either natural or artificially introduced into his *familia*. It could arise in various ways, but in particular by procreation from a civil law marriage (*iustae nuptiae*); also by legitimization in later law, by adoption and by *adrogatio*. As already seen, it might arise under a successful *anniculi probatio* or *erroris causae probatio* (*ante*, pp. 92, 93) as well and *postliminium* (*ante*, p. 75) could bring a child born after capture into *potestas* in addition to bringing back *potestas* that had already existed.

1. Marriage

As far as status of the children was concerned the major distinction was between civil law marriage and all other relationships. The latter were uniformly governed by the *ius gentium* and the children all followed their mother's status as at the time of their birth. Where there was a civil law marriage, however, it was the father's status as at the time of conception that prevailed. Strictly speaking this could cause confusion unless the Roman view was, as some texts may suggest, that the child conceived before, but born after, such a marriage was illegitimate and not under the father's *potestas* — a view that would be almost incredibly harsh, at least to modern eyes. Otherwise, however, a case might arise as follows: *X*, an *ancilla*, becomes pregnant by *Y*, a *servus*; shortly after, both are manumitted; *Y* marries *X*; the child is then born. Here the child is certainly born *ex iustis nuptiis*, but his father's status at conception was *servitus*. The child could never have been accounted a slave, yet the civil law rule would seem to make him so. The only fully logical way out is the harsh one of regarding him as illegitimate, therefore governed as to status by the *ius gentium* and a *civis* like his mother, but not under his father's power. Perhaps, however, logic did not rule and the Romans may well have treated such a child as in his father's power if he was clearly the father's child and was born in wedlock.

Various sexual relationships gave rise to legal consequences and it seems best to set them out in the form of a tree and then to deal with them individually.



Of these some can be dealt with speedily.

Contubernium was a regular union allowed between slaves but having no consequences at law (except for the question of consanguinity for marriage after manumissions) and depending upon the good grace of the masters concerned and the force of social opinion for its protection and continuance.

Stuprum was a general word for any union beyond the others specified: it might be a single union promiscuously effected or a continuing illicit relationship. In some cases it might be criminal as well as socially reprehensible (*e.g.* adultery). Children would always be *spurii* (illegitimate) and could never be legitimated — except by specific legislation.

Concubinatus was, however, very different in Roman eyes, at least in pre-Christian times. It had a social, though in no way a legal, standing, and was the normal union when a high-bred man consorted with a woman regarded as socially too inferior to be his wife. In practice it was usually 'monogamous' in that a man would not have a wife and a concubine at the same time or two concubines at once, but it was only in Christian times that it was definitely forbidden under criminal penalties to have wife and concubine together. The institution achieved social recognition — and almost respectability — after the marriage legislation of Augustus and particularly after the prohibition against marriage by serving soldiers. As such, under the early Empire, it was a sort of morganatic marriage and, indeed, where a man was living with a woman it was often difficult to distinguish it from marriage. While the legal effects of concubinage were very different from those of marriage (*e.g.* the children were illegitimate, gifts could be exchanged between the parties, the woman did not have the rank of her man), they also differed from those of *stuprum* (*e.g.*

legitimation became possible for children of concubines, but not otherwise; the *concubina* had certain privileges denied to her more despised sister, as also did the children). A man might quite regularly have his slave for a concubine. In the Christian Empire pressure was brought upon the parties to become 'honest' by marriage, and there was much, often conflicting, legislation in general discouragement of concubinage.

Marriage was also largely an institution of social fact rather than of law. The law, it is true, laid down regulations forbidding marriage in certain circumstances, but otherwise it merely accepted intention of the parties and attached legal consequences. Marriage was a highly regarded estate in Rome, especially in the Republic, and it was always monogamous in the sense that no one could have more than one spouse at the same time, though one could always remarry after divorce or the spouse's death. It was the attachment of legal consequences that really alone distinguished *matrimonium non iustum* from that *iustum*. The parties to the former would live together in very much the same way as those of the other, and they would be regarded socially very similarly: no stigma of illegitimacy would attach to the children, no discredit to the parties as in *stuprum* or even *concubinatus*. *Matrimonium* was just one idea — an idea that was essentially the same throughout that monogamous portion of the Mediterranean. The peregrine wife of the peregrine resident in Rome was as much a wife as that of his Roman neighbour. The *matrimonium* was, therefore, *non iustum* in the sense not of being unlawful, but of not creating any of the effects that the *ius civile* would create in a marriage of which it took cognisance. It was particularly common to use the term *iustae nuptiae* for a marriage that the civil law recognised and clothed with consequences. The *matrimonium* that was *non iustum* thus gave no *potestas* in Roman law to the father and never brought the wife into her husband's *manus* under Roman law; the children, too, followed their mother's status under the rules of the *ius gentium*. Peregrines and Latins would make such marriages in the eyes of Roman law — and provided the marriages were in accordance with the laws of the parties' own communities, they might well have rights under those laws not dissimilar from many of those conferred by *iustae nuptiae* on Romans. Junian Latins and *dediticii*, of

course, had no municipal laws and their marriages would give little in the way of rights.

Iustae nuptiae was any marriage in which both parties possessed *conubium* (also spelled *connubium*) — which, tautologically, was the capacity to contract a marriage the civil law would recognise. The parties were, therefore, the key to the classification of the marriage. If either party lacked *conubium* the marriage could not be *iustum*. All *cives* had *conubium*, as did *Latini prisci*. Certain peregrines were given the privilege (*ius conubii*), and in the Empire soldiers on discharge (*veterani*) were often given *civitas* along with an active *conubium*, i.e. one could marry a *peregrina*, though she had no *conubium* because on marriage one conferred upon her the special *conubium* towards oneself alone. (It was frequently used to enable a *veteranus* to marry in his own tribe and yet to retain the benefits of *iustae nuptiae*: the wife would not normally acquire *civitas* by it.) A *deportatus*, when he lost *civitas*, automatically lost *conubium* as well so that his marriage ceased to be *iustum*, while a *civis* enslaved of course lost all capacity and ceased to be married at all. It is to be noted that if the parties had *conubium* the marriage was necessarily *iustum* and it was impossible for their union to be *non iustum*.

Originally *iustae nuptiae* involved, probably necessarily, certainly normally, a particular kind of *potestas* known as *manus*. *Manus* was the power of a husband, or of his *paterfamilias* if he was *alieni iuris*, over his wife: the wife assumed a status similar to that of a daughter of her husband (i.e. *loco filiae* to him, or *loco neptis* to his father). She had the same rights of succession to her husband that her own daughter would have and probably the same disabilities — e.g. could not make binding contracts and would acquire only for her husband. All her property would automatically pass to whoever gained *manus* over her and her old agnatic ties were severed: she belonged now to her husband's *familia*. However, differences from *patria potestas* did exist: there is no trace of there ever having been a power to sell into slavery, to give in adoption, to put into effective bondage, or to surrender noxally, and, when there was a divorce (which would be rare in a *manus* marriage), the wife could insist on a release from *manus*.

Manus was created in three ways:

- (i) *Confarreatio* was a religious ceremony, probably confined

to patricians, at least in the early days. It derived its name from a cake of spelt (*far*) which was used in a sacrifice by the parties to Jupiter Farreus before ten witnesses in the presence of priests with a solemn form of words. It lasted into the Empire, solely, it seems, because only children of a union so consecrated could hold certain of the higher and more powerful priesthoods. As it was, legislation had to be passed to free women undergoing the ceremony for such priestly motives from the by now obsolescent *manus* in respect of private law. *Confarreatio* is mentioned by Gaius and it may well have survived till the end of pagan Rome, but it is very possible that in classical law it no longer created effective *manus* in any marriage.

(ii) *Coemptio* was a plebeian counterpart, it seems. Also involving ceremonial and a set form of words, it was apparently not a religious marriage and originated in some kind of bride-purchase. It was a ceremony *per aes et libram*, a variation of *mancipatio*, a solemn form of conveyance for property (*post*, p. 192). It involved the presence of five citizen witnesses and another citizen (*libripens*) to hold bronze scales and the 'sale' by the wife's *paterfamilias* or, at least in later times, by herself with her tutor's authority. The words used, however, made it clear that this was a very different institution from sale of a *res* and even from *mancipatio* of a *filius* into bondage. Pontifical *interpretatio* adapted *coemptio* for a very different purpose — the 'sale' was made *fiduciae causa* as part of a procedure to enable a woman *sui iuris* to rid herself of *tutela legitima* and obtain instead a tutor whose authorisation she could compel (*post*, p. 140).

(iii) *Usus* is an institution wrapped in mystery and the cause of great controversy amongst modern scholars. The one certainty is as to its effect: one year's continuous cohabitation (*usus*) by a man and a woman resulted in the man's acquiring *manus* over the woman. The Twelve Tables laid down that three nights spent by the woman away from her husband (*trinoctium abesse*) interrupted the *usus* and prevented *manus*. Beyond this there are a host of unsettled questions. Were the two married before the *manus* accrued or was the *usus* intended to regularise the union at the same time as conferring *manus*? Would the three nights' absence have to be repeated every twelve months or was the once sufficient? Did the Roman

form of 'free' marriage originate from *usus* and the absence or was it in existence from the beginning, *usus* operating upon it to set up *manus*? Did *usus* originally merely operate to 'cure' an imperfect ceremony of *coemptio*? Whatever the answers to these problems — and modern consensus seems more in favour of the view that marriage could at all times in Roman history exist independently of *manus* — it is certain that *usus* barely survived till the end of the Republic, whereafter legislation dispatched it, robbing desuetude of its victim. By that time marriage free of *manus* had become the rule, the statutory absence having probably been observed over the centuries in typical conservative fashion.

The marriage without *manus* was very free indeed. The wife retained her *familia*, remaining either in the *potestas* of her *paterfamilias* or under the guardianship of her tutor if she was *sui iuris*. Her property remained her own, though it was common practice for her husband to manage it. The children of the marriage came under her husband's *potestas* and thus were not agnatically related to her — it was left to the praetor and legislation to establish rights of intestate succession between them. The spouses had to show due respect to each other and so could not bring any action involving *infamia* against each other. A rule arose in the late Republic or early Empire forbidding gifts *inter vivos* between the spouses: there were reasonable exceptions, *e.g.* extravagant anniversary presents, and in later law a gift unrevoked became fully effective upon the donor's death. The rule did not apply to gifts in wills, and such gifts were very common.

The validity of the 'free' marriage did not depend on any ceremony or formalities. Although there were a number of disqualifications and certain consents were necessary, the essence of the marriage was agreement (*consensus*). Provided the parties intended marriage all that was needed was their coming together for the purpose of cohabitation. Usually there would be ample evidence that parties cohabiting were in fact married. In the first place there would customarily be a ceremony of betrothal (*sponsalia*) in which promises were exchanged, though such promises were not actionable, even if a penal stipulation were resorted to, and thus either party could withdraw freely. As the Empire continued and oriental influences became stronger, betrothal became more and more

important and many of the consequences of marriage were attached to it whilst it lasted, *e.g.* the fiancé (*sponsus*) could sue for *iniuriae* (insults) to his fiancée (*sponsa*) and infidelity during engagement counted as adultery. Secondly, the constitution of a dowry (*dos*) to help the husband maintain his wife was an almost invariable incident of marriage, clearly distinguishing it from concubinage: in later law the practice of the husband's settlement of property on his wife (*donatio propter nuptias*) was added evidence of a similar kind. There was also a presumption that marriage existed where there was no marked discrepancy in the social standing of the parties. Finally, it was Roman custom for the ceremony of *deductio in domum* to mark the beginning of marriage. This would involve considerable festivities and the leading of the wife by the husband (or by a proxy with the husband's authority) to his home. However, it must be remembered that all these factors were just evidence of marriage — proof that the necessary intent (*affectio maritalis*) existed between the two. It must also be noted that Roman marriage did not depend for its existence or its perfection upon consummation.

The consent of both parties was vital in the developed law, but in the early days of absolute *potestas* the *paterfamilias* could force a marriage upon a descendant and just as freely effect a divorce. In the Empire, if not before, the patriarchal right became one of veto only, no marriage being valid unless the *paterfamilias* of each party consented beforehand. Moreover, in the case of the bridegroom the consent of his father (and of any other natural ascendant still in the power of the *paterfamilias*) was also required because no man should run the risk of having a possible *suus heres* (*viz.* a descendant of the marriage contemplated) provided for him without his consent. In the case of the bride, however, no such consideration was applicable and thus only the *paterfamilias* needed to consent. Where these consents were either unobtainable or unjustifiably withheld there was originally no way of evading them, but under the Empire there was considerable legislation with prolonged controversy till the time of Justinian. Under Augustus the first step was made: a procedure *extra ordinem* was set up whereby a parent or other ascendant causelessly refusing could be forced to consent; but this was probably confined to the case of the bride — the reasoning in respect of the *sui*

heredes probably obstructing such a reform in the case of a son. It is quite uncertain whether there was any relaxation of the old rules in the son's case until Justinian. A similar development occurred where the parent was *furiosus* (mad) or captive: by *interpretatio* the bride was held not to need the consent in such a case, but again the relaxation for the male may not have come till Justinian's legislation.

A male *sui iuris* needed no consents to marry provided he had reached the age of puberty. A female *sui iuris*, however, needed her tutor's consent to contract a *manus* marriage, and perhaps for any marriage; and under the Empire when *tutela* of women was gradually disappearing, it seems that the consent of the mother (or father if he had emancipated the bride) or other near relatives was needed, although in the fourth and fifth centuries a woman over twenty-five and *sui iuris* no longer needed any consent at all.

The need for the parties themselves to consent (or at least to intend marriage when their consent could be forced by the *paterfamilias*) necessarily excluded *furiosi* from marrying, but a mistake, even though fraudulently procured, would only prevent a marriage if it was as to the identity of the other spouse: the ease of divorce was sufficient to enable other mistakes to be rectified harmlessly. Both parties had to have reached puberty: this originally involved physical examination under the supervision of the *paterfamilias*. In the case of girls such a test was early abandoned and the age of twelve substituted; for boys, the test remained and under the Empire the Sabinians contended for its retention while the Proculians advocated the qualification of merely reaching fourteen years. The latter was finally adopted, but perhaps not before Justinian.

Disqualifications from marriage may be classified as (i) total — *i.e.* debarring marriage with anyone and (ii) partial — *i.e.* only as between certain parties; also as (a) permanent and (b) temporary. Lack of capacity by virtue of disqualifications was phrased in terms of absence of *conubium*.

(i) (a) Total and permanent disqualifications —

(1) *Castrati* (eunuchs); impotent persons of either sex were also probably disqualified, at least in classical law.

(2) Vestal Virgins in pagan times.

(3) Those, especially priests, who had taken a vow of chastity in Christian times.

(i) (b) Total but temporary disqualifications —

(1) Soldiers on active service could not marry from the time of Augustus until Severus abolished the rule in A.D. 197. The rule had a great effect on the increase in concubinage during the period, and for much of the time there were frequent imperial grants to legitimise the children and the marriage upon discharge.

(2) Persons already married, until the death of the other spouse or divorce. Augustus forbade an adulterous spouse from ever remarrying: Justinian narrowed the prohibition to the period of the innocent spouse's life, but retained the absolute bar as against the other party to the adultery.

(3) Widows for ten months (later one year) after their husband's deaths; a religious rule at first, becoming supplemented by a policy of evading doubts as to paternity.

(4) Slaves and *impuberes* (children under puberty), as already seen, as also *furiosi* whilst madness lasted.

(ii) (a) Partial but permanent disqualifications —

(1) Blood relationship (*consanguinitas*). Persons lineally related (*e.g.* mother and son, grandfather and granddaughter) could never intermarry. In the early Republic there were severe limitations on those collaterally related; thus second cousins, and perhaps even more remote relatives, could not marry each other. Gradually there came a relaxation, and by the beginning of the Empire first cousins could marry. In A.D. 49 Claudius made the solitary exception to the settled rule that persons could not marry if one at least of them (*i.e.* uncle, aunt, brother, sister) was only one degree removed from the common ancestor: in order to enable him to marry his niece, Agrippina, Claudius passed a law permitting a man to marry his brother's daughter; other unions (*e.g.* with sister's daughter or father's sister) remained void and incestuous. This law was repealed under Christian influence by imperial constitution in A.D. 342.

(2) Adoptive relationship. Once an adoption or adrogation had taken place there could be no marriage between persons who were as a result in the position of lineal relation, even after a breaking of the adoptive tie, *e.g.* by emancipation.

(3) *Affinitas* (relationship by marriage). In classical law one

could not marry a person who had been the spouse of a lineal relation (*e.g.* stepmother) or one's spouse's lineal relation (*e.g.* mother-in-law or stepdaughter), nor even one who had been betrothed to such a relation. In later law one was forbidden also to marry one's brother- or sister-in-law, but not such betrotheds. A stepbrother could always marry his stepsister.

(4) Until the *lex Canuleia* (traditionally 445 B.C.) patricians and plebeians could not intermarry.

(5) During the Republic *ingenui* and *libertini* could not intermarry. After Augustus, freed persons could not marry persons of senatorial rank, *i.e.* senators or their children or grandchildren. Marriage was also forbidden between persons of the latter rank and members of the more disreputable professions of the day, *e.g.* the stage. The prohibition lasted till Justinian's time.

(6) Christians and Jews could not intermarry under the Christian Empire.

(ii) (b) Partial and temporary disqualifications —

(1) Adoptive relationship. Persons collaterally related only by adoption or adrogation could not intermarry whilst the tie remained but were not restricted thereafter (*e.g.* adoptive brother and sister).

(2) A guardian could not marry his ward, nor could his son. However, relaxations of this rule, which was created by M. Aurelius, came about — *e.g.* where they were betrothed beforehand or the girl had reached 26.

(3) A provincial governor (or his son) could not marry a woman domiciled in his province. This was again the result of imperial legislation, and there were relaxations, *e.g.* previous betrothal.

In all these causes for disqualification it is not difficult to see some political, social, religious or eugenic policy underlying. In some cases the union was not only invalidated, but also gave rise to criminal sanctions, *e.g.* for incest. In certain of the temporary ones, *e.g.* that of the provincial governor, continued cohabitation after the cessation of the cause validated the marriage from that moment.

Dos

This was a contribution by the bride or by persons on her behalf towards the upkeep of the joint household. Though

a husband had no legal duty to provide for his wife it was a very strong custom that he should do so, even in free marriages. On the other hand, it became the almost invariable practice for a *dos* to be given to bear a fair share of the expenses. In the days of *manus* marriage all the wife's property would, of course, pass with her, but if she had little or none then her *paterfamilias* or other relative (or even friend) would hand over a *dos* to the husband.

When free marriage became the rule, the custom continued: a *dos* was handed over whilst the wife, if *sui iuris*, retained the rest of her property (later called *parapherna*). It was frequently the practice for the giver of the *dos* to take a stipulation (*post*, p. 332) from the husband for the return of the *dos* when the marriage should end. This promise of return was called the *cautio rei uxoriae* and the *dos* came to be named *receptitia* when such a *cautio* was taken. The remedy for such a promise would be the normal *actio ex stipulatu*. This practice gave rise to the idea that the *dos* was somehow a fund the income of which was to be used for the household expenses but the capital to be returned, at least in certain cases. It was never suggested that the husband was not *dominus* — the property constituting *dos* was handed over with all proper formalities. However, before the end of the Republic the praetor had developed an *actio in personam* (probably either *in factum* with an *ex aequo et bono* clause or other phrase conferring discretion on the *iudex* or else *in ius bonae fidei*) and this was called the *actio rei uxoriae*. It provided for the return of the *dos*, probably with deductions in the discretion of the *iudex* for specified causes, in cases of the husband's death before the wife or of divorce.

The growing frequency of divorce increased the impetus of the innovation and the marriage legislation of Augustus (*lex Iulia de adulteriis*, c. 17 B.C.) introduced a comprehensive system. Apart from *dos receptitia*, which remained as before, *dos* was now clearly divided into two categories: that supplied by the bride's *paterfamilias* (*dos profectitia*) and that coming from any other source (post-classically called *dos adventitia*). The importance of the distinction lay where the wife died undivorced before the husband: in such an event the *adventitia* would always remain with the husband; the *profectitia* would have to be returned to the *paterfamilias*, but only if he

were still alive, and the husband was entitled to deduct one-fifth of the *dos* for each child left in his *potestas* (thus he retained the whole *dos* if he had five children). Where the wife survived her husband or where there was a divorce both types of *dos* had to be restored: to the *paterfamilias* and the wife jointly if she were still in his *potestas*, otherwise to the wife alone. In all these cases the remedy was the *actio rei uxoriae*. The deductions for the children show the growing tendency towards their benefiting from their dead mother's *dos* (although the father kept full control of the fund), whilst the rules for return show clearly the implication that the husband's ownership was becoming regarded as limited. Where the wife or her *paterfamilias* was at fault over the divorce (*i.e.* repudiated causelessly or gave grounds for the husband's *repudium*) the husband had substantial rights of deduction (*ius retentionis*). Thus he could retain one-sixth for each child, to a maximum of three children (*propter liberos*), and also one-sixth for a major matrimonial offence (adultery only, in classical times), one-eighth for a lesser one (*propter mores*). The husband's offences would be punished in a different way: after divorce he would have to support the children unaided, and he would also lose the benefit of certain time concessions for repayment. He could normally pay back parts of the *dos* consisting of *res* that became consumed or lost by use (*e.g.* money, fuel) by instalments over three years, but upon adultery he was bound to pay back immediately, and for lesser wrongs within six months. Other *res* had always to be returned or their value paid over immediately. Whether the cause for restoration were death or divorce, then, regardless of fault, the husband could always deduct: (i) all necessary expenses on the dotal property, and perhaps also useful ones incurred with the wife's consent (*propter impensas*); (ii) the value of all gifts to his wife other than those regarded by the law as valid (*propter res donatas*); and (iii) the value of all *res* of the husband taken away by the wife after a divorce (*propter res amotas*). These latter deductions were available to the husband's heir. If the husband restored the *dos* without making the deductions entitled, he had various substantive actions to recover a similar amount: *actio de moribus*, a *condictio* for *impensae* and for the gifts, and an *actio rerum amotarum* (*post*, p. 401). The various rights of the parties could, it seems, always be changed by stipulations.

The complicated rules as to restoration and deductions were not the only changes in the conception of the *dos*. The husband was now really entitled only to the fruits of the *dos* — other benefits accruing to *res dotales* (e.g. a legacy to a slave) had to be handed over along with them. Moreover, the husband was held liable for any destruction or damage in respect of *res dotales* caused by his intention (*dolus*) or negligence (*culpa*) — he was expected to show the standard of care of a *bonus paterfamilias*. In addition, he was forbidden to alienate without his wife's consent Italic land forming part of the *dos* (*fundus dotalis*), and by *interpretatio* he was forbidden to mortgage it even with such consent. These dotal immovables could not be usucaped.

Besides the normal practice of transferring the *dos* before or at the time of the marriage the *dos* could be solemnly promised beforehand either by a special unilateral formal declaration by the wife, her *paterfamilias*, or her debtor (*dotis dictio*, *post*, p. 331) or by the general contract of *stipulatio* by anyone. In the fifth century A.D. *dotis dictio* was an obsolete form, any informal promise (*pactum*) to constitute a *dos* being actionable.

In post-classical times the husband came more and more into the position of a trustee of the *dos*. Moreover, the *paterfamilias* of the wife came under an obligation to provide a dowry. While the husband still technically had *dominium* over the *dos*, he was now in fact little more than a usufructuary. Unlike the position in classical law the wife no longer had to wait till the end of the marriage to sue on her rights in the *dos*. Alienation of dotal land was prohibited by Justinian in 530 even with the wife's consent (although from 537 the wife's renewal of authorisation after two years perfected the alienee's title). Justinian also provided that in all cases, apart from special agreement, the *dos* should be returned intact at the end of the marriage: to the *paterfamilias* in the case of *profectitia*, to the wife in that of *adventitia*, and in each case their respective heirs (especially the wife's children) for the first time could claim in the event of a decease. All the husband's rights of deduction were abolished, but he still retained his independent remedies, except the *actio de moribus*. The *actio rei uxoriae* was also abolished, and the notion of an implied stipulation (on the model of the *cautio*) was introduced so that an *actio ex*

stipulatu, specially modified to keep the *bonae fidei* element, became available under the new name of *actio de dote*. The wife was also given a *vindicatio* to recover the *dos* (even during the continuance of the marriage where property was in danger) — a sign of how nearly she had come to being regarded as owner. Dotal land had to be handed back immediately, other *res* within a year.

In classical times the wife was entitled, it seems, to recover the value of the *dos* in priority to other unsecured creditors. In Justinian's law she achieved much greater security, gaining first priority over persons with hypothecs (mortgages) over dotal property; then an implied mortgage over the whole of her husband's property with priority from the date of marriage over all subsequent creditors, secured or not; and finally in 531 it seems (almost incredibly) that this general hypothec was extended to give priority even over creditors with hypothecs prior to the marriage. This must have wreaked havoc upon the credit, first of married men, then of bachelors also, but evidence is lacking of its precise effects.

One last interesting aspect of *dos* was the practice arising soon after restoration became enforceable whereby the husband had the *dos* valued upon receipt, and thereafter he was bound only to restore that value. This meant that he could deal as he liked with all the property, land included, and negligence had no effect; he would, however, have to pay the whole value whether or not any *res* had been destroyed by his fault or accidentally, the risk being upon him, not upon the wife as in other cases. *Dos aestimatoria*, as it was called, continued under Justinian, backed up now by the general hypothec.

Donatio propter nuptias

In classical times it was not uncommon for a bridegroom to make a gift to his wife before their marriage and this was often returned as part of the *dos* — or the husband merely supplemented the *dos*. The idea was normally to ensure that the wife was properly provided for if he predeceased her. This *donatio ante nuptias* could not, however, be regarded yet as any special institution like *dos*. It was only with Greek and oriental influence that there arose such an institution in the Byzantine period. Much legislation then ensued. Originally there had to be transfer of the *res* as in normal *donatio*, but

from the fifth century a promise to give was sufficient to bind the property whilst it remained in the husband's *dominium*. Also, the *donatio* had to be made before marriage to evade the prohibition of gifts during marriage (to which *dos* had never been subject), but Justin I allowed increase of the *donatio* after marriage and Justinian enabled it to be constituted wholly after marriage, whence its change of name to *donatio propter nuptias*. The rules were more and more assimilated to those of *dos*: the same rules as to immovables applied under Justinian and the wife was given a tacit hypothec to secure it in the hands of the husband (but this was not privileged as in *dos* — it did not take priority over earlier securities). Under Justinian the *donatio* had to be of the same amount as the *dos*, and there were also a number of provisions ensuring that children of the marriage as well as the wife should benefit from the *donatio* if there was a divorce or the husband died first.

Termination of Marriage

Marriage came to an end —

- (i) By the death of either party.
- (ii) By either party's becoming a slave. Captivity originally ended marriage, *postliminium* not operating to restore it: the parties would have to remarry, but renewed cohabitation would be clear evidence of such remarriage. However, the marriage subsisted under Justinian if the husband was known to be alive. If this were not known, the wife could not remarry for five years.

Loss of *civitas* — normally only in the Empire with the case of a *deportatus* — did not by itself destroy marriage, but thenceforward it would be only *non iustum* with no effects in Roman law. It is uncertain how far *capitis deminutio minima* (*post*, p. 147) with its breaking of *familia* affected marriage with *manus*; certainly free marriage never seems to have been dissolved by it, and apparently upon adrogation the *manus* of the husband over the wife passed to his new *paterfamilias*, at least in the developed law.

- (iii) By operation of law. Thus, if the husband of a *libertina* became a senator before Justinian's time, his marriage ended by virtue of the marriage laws of Augustus. Again, until A.D. 197, the husband's joining the army seems to have

been fatal to the marriage. A husband's adrogation by the wife's *paterfamilias* (or the *adoptio* of the wife *alieni iuris* by the husband's *paterfamilias*) would end the marriage by virtue of *incestus superveniens* unless the wife had been emancipated previously. Under Justinian the *paterfamilias* was legally bound to emancipate her beforehand.

(iv) By divorce by *paterfamilias*. Throughout the Republic and until the second century A.D. *patria potestas* was so strong as to enable the *paterfamilias* to divorce his son or his daughter despite the marriage's being a happy one (*matrimonium bene concordans*). The power, at least of the *paterfamilias* of the wife, was cut down by Antoninus Pius and M. Aurelius, but even under Justinian it seems that a power remained for either *paterfamilias* to divorce for grave reason (*magna causa*).

(v) By divorce by the parties. Apparently such divorce was always possible in Roman law, but originally a spouse *alieni iuris* may have needed the consent of the *paterfamilias*. However, the austere early Roman temperament made divorce very rare until the last century or so of the Republic, and in the cases that did arise it was almost invariable practice for the family council to be called in to ensure that there was real cause and the wife's family had to be present at the council. In these days it may also have been impossible for the wife to divorce her husband at all.

Towards the end of the Republic divorce became frequent, at least in high society, although there is reason to think that the bulk of the population remained very constant in their marriages. No formality was needed for divorce and when, as frequently, it was by mutual consent (*divortium* in the strict sense) the parties would just cease to live with each other. If one party alone wished to divorce it was more normal to send a message (*repudium*) in writing or by messenger. Causeless divorce put one in danger of being marked with a *nota* on the *census* by the censor, with considerable social ill-effects. Under the Empire until Christian times freedom of divorce continued more or less in the same way, but a *lex Iulia* of Augustus may have required seven witnesses in the case of *repudium*. The only restraints on divorce were the indirect ones in respect of retention or loss of *dos* and the disabilities of unmarried persons in the law of succession after the legislation of Augustus (*post*, p. 287).

Manus marriage was probably originally dissolved along with the *manus*, and for *confarreatio* a converse process of *diffarreatio* was available for all except priests of Jupiter and involved religious ceremonies also. *Manus* resulting from *coemptio* or *usus* required a *remancipatio*. Whatever the early position, in the developed law marriage was separate from *manus* and could be ended in the same ways as free marriage, the wife who sent a *repudium* being able to insist on her emancipation.

With the Christian Emperors the position began to alter, though even after Justinian divorce still continued to be possible and ended legal marriage. The legislation varied from time to time in its harshness. Constantine rigorously punished *repudium* without one of specified serious grounds, and limitations began to be put on the capacity to remarry — sometimes temporary, sometimes permanent. Justinian abolished divorce by mutual consent except where the parties intended religious lives thereafter. (His successor, however, repealed the provision.)

2. Adoption and Adrogation

Both Gaius and Justinian use the word '*adoptio*' to include (a) *adoptio* in the strict sense, *i.e.* of someone *alieni iuris*, and (b) *adrogatio* of a person *sui iuris*. The two have in common especially that a *paterfamilias* by a legal act introduces a person not under his *potestas* into the *familia* and thus under his power: both are cases of artificial augmentation of the family.

(a) *Adoptio* proper was where a person under one *potestas* was given into another *potestas*. It therefore involved two acts: the extinction of the agnatic tie in relation to the original family (this part of the proceedings was virtually the same as the ceremony of *emancipatio*, *post*, p. 127) and the creation of an agnatic tie in relation to the acquired family. Originally, no doubt, an adoption was regarded as impossible. Adoption is thought to have been first made feasible by reason of a construction put by the jurists upon a provision of the Twelve Tables which aimed merely at punishing callous fathers. This was to the effect that a father who sold his son into *mancipium* three times should thereby for ever lose his *patria potestas* over such son, and was the basis of the first part of the ceremony of adoption as described by Gaius. This had for its

object the breaking of the old agnatic tie and succeeded in so doing by means of three solemn conveyances or sales and two lawsuits. The process was as follows: *A*, the natural father, procured the attendance of his son, *B* (to be given in adoption), five Roman citizens above the age of puberty, a *libripens* (i.e. another such citizen holding a pair of scales), and a friend, *C*. *C* bought *B* from *A* for a nominal sum, using due words and forms. Thereupon *B* became *in mancipii causa* to *C*. *A*, *B* and *C* thereupon went before the praetor; *A* or someone on his behalf claimed that *B* was really a free man; *C* did not deny it; and the praetor decided that *B* was free. In other words, *C* had manumitted *B* *vindicta*, and thereupon, since only three sales could destroy *patria potestas* over a son (though one was enough for a daughter or any grandchild), *B* reverted into the *potestas* of *A*. Accordingly, the same sale and the same fictitious lawsuit were gone through a second time and for a second time *B*, after being *in mancipii causa* to *C*, fell back into *A*'s *potestas*. Then for a third time *B* was sold to *C* and for a third time stood to him *servi loco*, but the provision of the Twelve Tables had been called into operation and *A*'s *patria potestas*, the old agnatic tie not only between *A* and *B*, but between all the members of *A*'s family on the one hand, and *B* on the other, had disappeared for ever and the first part of the ceremony of adoption was complete.

The object of the second half of the proceedings, *viz.* the creation of a new agnatic relation between *B* and *D*, the intended adopter, might have been attained by *D*'s claiming in a fictitious suit that *B*, whom *C* asserted was *in mancipii causa* to him, was really *D*'s *filius*, *C* making no defence; but usually *C* made a mancipation or sale of *B* back again to *A*, his natural father, to whom *B* would now stand not as a son but *in mancipii causa*, and then by *cessio in iure* (which was probably a modified and collusive *vindicatio*, *post*, p. 194), with *A* making no defence, *B* would be adjudged *D*'s *filius-familias*. A person might be adopted as a son — or daughter, of course — or as a grandchild, whether or not the adopter had any children or not; and the adoptive child might be attached to a son in power (with the latter's consent, in the developed law) so as to become the son's *suus heres*, or not so attached. One's own child or grandchild who had been given in adoption could be readopted, but this did not restore the

original ties between him and other members of the family; thus a grandchild readopted would not become again the child and *suus heres* of his natural father unless the grandfather expressly reattached him as such to that father. An adoptive child could be emancipated, but, at least ultimately, he could thereafter not be readopted by that adopter. In early law a child could be adopted merely at the whim of the two *patres-familiarum*, but in the developed law *adoptio* could not be effected if the child objected: this meant lack of objection only, not necessity for consent, so a baby could be validly adopted without any query as to consent.

The effect of adoption was that the child broke away from its old family in every respect, in particular losing all right of intestate succession to the natural father, but acquiring a new right of succession to the adoptive father, exactly as if he had been born into his family. However, upon subsequent emancipation he was regarded by the praetor as if he were the *emancipatus* of the natural, not the adoptive, father so that his rights of succession under the praetorian system of *bonorum possessio* (*post*, pp. 248, 293) were to the natural father alone.

In theory the adoptive child could be of any age (subject to the later rules as to the relation with the adopter's age which applied to *adrogatio* as well, *post*, p. 120) and this would involve his leaving his children still in the *potestas* of his old *paterfamilias*, and this included even children conceived before, but born after, the adoption. His marriage would continue, at least if free, and his children conceived later would come into his new *familia*.

There were two important changes in adoption in Justinian's time.

(1) As a matter of form all that was necessary was that the natural father, the adoptive father and the person to be adopted should go before the magistrate and make a declaration which was thereupon entered on the *acta* (records) of the Court.

(2) Justinian drew a distinction between *adoptio plena* and *adoptio minus plena*. *Adoptio plena* was only to take place when the adoption was by a natural ascendant, e.g. a maternal grandfather, and in such case the effect was as under the old law. In every other case the adoption was *minus plena*; the child, as a fact, passed into the physical control of the person adopting, but as a matter of law remained a member of its old

agnatic family, and the only legal effect of such an adoption was that the child acquired a chance of intestate succession to the person making the adoption. Justinian was trying to guard against this sort of danger: suppose *A* has given his son *B* in adoption to *C*, who is a wealthy man; he naturally supposes that *C* will provide for *B*. So he distributes his own property by his will among his other children. After *A*'s death *C* capriciously emancipates *B*, who is thus left without resources. This danger would, of course, be remote where the adopter was a natural ascendant of the child adopted.

(b) *Adrogatio*, which is an earlier institution than adoption proper, took place when a person who was *sui iuris* (and thus himself a *paterfamilias*) became *alieni iuris* by placing himself under the *potestas* of another citizen, and since this involved the extinction of a Roman family and thus the abandonment of the family *sacra*, which was the heart of the religion of pagan Rome, the proceedings took place originally in a full popular assembly — the *Comitia Calata*, presided over by the Pontifex Maximus. There (after a preliminary inquiry into the expediency of the act had been made by the pontiffs) the person making the adrogation (*adrogator*), the person to be adrogated (*adrogatus*) and the citizens present were asked if they respectively consented to the adrogation. If they did, by the vote of the *Comitia* the *adrogatus* passed into the *potestas* of the *adrogator*, to whom he stood as a *filiusfamilias*, his own family with its *sacra* being destroyed. And there also passed with him into the new *potestas* his descendants (if any), his wife *in manu*, and the whole of his property, *i.e.* all his corporeal property and his rights, save such purely personal rights as were extinguished by the *capitis deminutio* (change of status) which took place (*e.g.* services due to him by a freedman; formerly *ususfructus* and *usus* also, but Justinian amended the law in this respect). With regard to obligations owed by the *adrogatus* there was a distinction; if due from him as heir of some deceased third person, they passed to and bound the person making the adrogation; if merely personal, they became extinguished altogether at strict law. This was because the *adrogatus* was deemed to have always been in the *potestas* of the *adrogator*, so that he would have had no contractual capacity (at least in early law, when the adrogation rule became

fixed); but he would have been able to accept an *hereditas* and that acceptance necessarily involved undertaking all the obligations as well. The praetor intervened in the cases of the obligations not arising from *hereditas* and gave an action against the *adrogatus* with the fiction that he was still *sui iuris*; if the action was undefended, execution and sale was allowed against the property that the *adrogatus* had brought into the *potestas*. Obligations on delicts were not extinguished and a noxal action could be brought against the *adrogator*, leaving him the option of paying damages or handing over the *adrogatus*.

After the *Comitia Curiata* had decayed during the Republic and the citizens were represented by thirty lictors, adrogation still took place there and the proceedings were, even then, not purely formal, since a judicial inquiry was still held by the pontiffs; and the consents of the parties were as necessary as before. It was not until Diocletian that the form changed, when for the vote of the *Comitia* was substituted a rescript of the Emperor, a form which continued under Justinian. The only change made by that Emperor was that he reduced the interest of the *adrogator* virtually to a mere usufruct in the property of the *adrogatus*; i.e. the *adrogatus* was put in the same position as a natural son who had always been *in potestate* and who now had *dominium* in all property except that furnished him by his *paterfamilias*; the latter retained some succession rights in addition to the usufruct of some of the property (*post*, p. 125).

The purpose of adrogation was to keep alive a family which was in danger of failing through the lack of heirs. Hence only the childless could resort to it, and those who through age or some similar reason were not likely to have children. The various rules were originally just matters of pontifical practice that would have to be observed for the pontiffs to recommend the adrogation, but in imperial times they hardened into rules of law. Only one person could be adrogated, and apparently only as a son, not a grandson.

Originally since the act took place in the *Comitia*, adrogation could only be effected at Rome, but a provincial may have been able to have it effected by letter or proxy. A woman could neither adrogate nor be adrogated, perhaps because she could not appear before the *Comitia*; nor could an *impubes*

be adrogated, a further reason for this last restriction being that a man might, by adrogating a child one day and emancipating him the next, acquire and retain all his property without incurring any obligations in respect of him. When the vote of the *Comitia* was replaced by Imperial rescript, adrogation became possible in the provinces; under Diocletian it was recognised that women could be adrogated. The adrogation of an *impubes* was made possible, in particular cases, by special grace of the Emperor. Antoninus Pius generalised this under certain stringent conditions. Besides the inquiry as to the age of the parties, the motives of the persons making the adrogation, the possible injury to his family and the advantages to the other party, the tutor's *auctoritas* (sanction) was necessary and certain further conditions had to be fulfilled —

(1) Liberty was reserved for the *adrogatus* to put an end to the adrogation, if he so wished, on attaining the age of puberty.

(2) The *adrogator* gave security that if, with good cause, approved by a magistrate, he emancipated the *adrogatus* while *impubes*, or if the *adrogatus* died under that age, he would restore the property in the one case to the *adrogatus*, in the other to his heirs.

(3) Further, that if he disinherited him or emancipated him without showing cause approved by a magistrate, the *adrogatus* could, on the death of the *adrogator*, claim the return of his own property plus a quarter of that of the *adrogator* (called the *quarta Antonina*).

Some special cases of adoption —

(1) Adoption of one's own slave. Cato is said to have recorded that in ancient times a master could adopt his own slave. The exact machinery is not clear. One suggestion is that he sold him collusively to another, from whom he then claimed the slave as his son before the praetor. The objection is that this is really the adoption of a slave formerly one's own, but now another's. Another view is that it was effected by adrogation. It was unknown in classical law. But Justinian provided that if a master had recorded in the *acta* of the Courts that a slave of his was his son, this was equivalent to a manumission *vindicta*, but did not effect an adoption.

(2) Giving one's slave in adoption. Gellius asserts that in
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ancient times this could legally be done. The form was that of a *cessio in iure* before the praetor (*adoptio* proper). It was not permissible in later law, but the slave could be manumitted by his master and then adrogated by the *adrogator*, the *adrogatus*, however, remaining a *libertinus* even if the *adrogator* were *ingenuus*.

Adoptio and *adrogatio* were alike in the following respects —

(1) In each case (save in the *adoptio minus plena* of Justinian) a person changed his family.

(2) On the principle *adoptio naturam imitatur* the *adrogator* or adopter had, under Justinian, to be at least eighteen years older than the other person, and could not adrogate or adopt if physically incapable of marriage. The fixing of the age limit was a matter of slow growth, for Cicero derided Clodius for having been taken in adrogation by a younger person. Gaius confessed to doubt upon the legality of such an adrogation; but by the time of Modestinus the rule was settled as we find it under Justinian.

(3) A woman could not adopt in either sense of the word, though, later, under Diocletian, a woman, as a solace for the loss of her own children, was allowed to 'quasi-adopt', though she did not thereby gain *patria potestas* but gave the child a right of succession to her.

The institutions differed —

(1) In *adoptio* a person *alieni iuris*, in adrogation one *sui iuris*, changed his family.

(2) Not only the *adrogatus*, but also his descendants passed into the *potestas* of the *adrogator*.

(3) So long as adrogation was *populi auctoritate*, it could take place only at Rome.

(4) Women, though they could always be adopted, could not be adrogated until the time of Diocletian.

(5) An *impubes* could always be adopted, but could not normally be adrogated until Antoninus Pius.

3. Legitimation

Roman law before the Christian Empire paid scant attention to the illegitimate child. The father had no duties with regard to it, and the mother was not agnatically related to it — as indeed she was not to her legitimate child, apart from

manus. Illegitimates were solely under their mother's control and when legitimate children gained a right of intestate succession to their mother (*post*, p. 295) the illegitimate received the same right. There was no legitimation until Constantine's time, but a similar effect could be achieved by *adrogatio* of a son, such an act no doubt going far to clear any social stigma from the child. (Freed slaves often bought and manumitted their children and then adrogated them.) However, illegitimate daughters could not be brought into the family in this way till Diocletian.

The Christian Emperors used the new institution of legitimation as one of the weapons whereby to discourage concubinage. It is important to note that *legitimatio* never applied to any children but those born in *concubinatus*. An interesting example of the policy is the later rule that adrogation and adoption of children by concubines were forbidden and invalid. Three methods of *legitimatio* arose.

(a) *Per subsequens matrimonium*. Legitimation by the subsequent marriage of the parents was introduced by Constantine, the first Christian Emperor, but only for existing illegitimate children: there was to be no encouragement of men to enter concubinage with the ability to regularise the position later whenever they liked. Other such grants were made by later Emperors, but only in A.D. 517 was a general legal rule established for the future. In the law of Justinian three conditions were necessary: the marriage must have been possible when the child was conceived (and therefore the children of an incestuous union, or born in adultery, or born from the union of a citizen and a slave, would not have their position improved by a subsequent marriage between the parties), there must be a proper marriage settlement (*instrumentum dotis*), and the child must not object. The reason for this last requirement was that, being born out of wedlock, the child was *sui iuris* and under no control, and therefore ought not to be brought under *potestas* and made *alieni iuris* against his will. At first it was not allowed where there were legitimate children, but in the end it was permitted.

(b) By imperial rescript. Justinian provided that if legitimation *per subsequens matrimonium* were impossible (*e.g.* the mother were dead), and if there were no legitimate child, natural children might by a rescript, given on the application

of the father or after a request in his will, be put in the same legal position as if born legitimate.

(c) *Oblatio curiae*. Theodosius and Valentinian in A.D. 443 provided that citizens who had no legitimate children might, by making a natural son a *decurio* (member of the *curia* or order from which magistrates were chosen in provincial towns), or marrying such a daughter to a *decurio*, be succeeded by such children on intestacy. Justinian allowed such a child to pass under *potestas*, thus making it true legitimation, and even if there were legitimate children. The reason for this exceptional piece of legislation was that to be a member of a *curia* was a costly distinction and that recruitment was not easy owing to the unwillingness of the citizens to bear the burden. Legitimation effected in this manner had, up to a certain point, the same effect as if made in the two ways before mentioned. The child, in all three cases, became legitimate, subject to *patria potestas*, and acquired the right of succeeding his father. But whereas children made legitimate by either of the two other methods entered their father's family for all purposes and so got possible rights of succession to other members of the family, a child made legitimate by *oblatio curiae* acquired no succession rights to any member of the family save his own father. It is another example of a Roman institution being inaugurated for a general policy and then being used for another quite different policy.

4. The Nature of *Patria Potestas*

Everywhere law gives the father certain rights and powers with respect to his children, but nowhere are they comparable in developed systems with the Roman institution of *patria potestas*, whether in extent or in duration, which continued throughout life. It had two main aspects: (1) as regards the child's person and (2) as regards its property.

(1) Originally the *paterfamilias* had the right to accept the child as legitimate or to reject it, but in imperial times, if not earlier, a child conceived and born during a marriage was in effect presumed to be legitimate in the absence of a judgment to the contrary. There existed in addition, after acceptance, a power to expose the child to perish of cold and hunger; and though this was forbidden in A.D. 374, the practice was not completely discontinued. The father's power of life and

death (*ius vitae necisque*) was very real in early law, but such a grave act necessitated (by custom, if not by law) a family council and judgment. Exercise of the power was rare even at the end of the Republic. Under the early Empire individual cases may have been punished as they occurred (e.g. by Hadrian), but it is very uncertain whether there was any general rule of law excluding the power. The principle may, however, have grown up then that the *paterfamilias* was punishable if he killed without just cause and without a family judgment. The power may have been abolished before Constantine, who seems to have classed such killing as parricide, more heinous than ordinary murder. It is even suggested that the father's power was not abolished till later, in A.D. 365. The considerable doubt is probably due to the extreme rarity of the cases, and perhaps each individual case provoked legislation which may not have been more than reiteration of previous laws, but in stronger terms and with heavier penalties. Certainly in the late Empire only a court had the power to sentence to death and the *paterfamilias* was left with the right solely of moderate chastisement. As early as Trajan a *paterfamilias* could be forced to emancipate a son whom he had unjustly and severely castigated.

In early law the father could sell his child as a slave *trans Tiberim*, but this power was obsolete before the end of the Republic. In the late Empire, however, a father could sell his newly born children into slavery if he was too poor to rear them, but the perpetual right to redeem them on repayment of the price was reserved. Sale into *mancipium* was obsolete before the end of the Republic, except for the purely formal sales incidental to adoption and emancipation and for the ceremony of noxal surrender. This latter power of handing over a child instead of paying damages for its delict (*post*, p. 423) was obsolete as regards girls quite early in the Republic, but remained for males until Justinian prohibited it. Pledging of children against debts was as much forbidden as sales of them under the Empire, but infringements of the law called for repeated penal legislation. The power to impose a marriage upon one's unwilling child dwindled into a right only to withhold consent quite early in the Republic, but the child's right to marry in the face of an unreasonable refusal of consent was only fully won under Justinian, it seems (*ante*, p. 104). The

power to divorce was similarly cut down (*ante*, p. 113). The power to appoint guardians by will (*post*, p. 129), and to make, in effect, a will for the child if it survived the father, but died before it was old enough to make a will for itself (*post*, p. 262), survived to the end.

The *paterfamilias* had a full armoury of remedies to recover a child taken from him or detained by another. The civil law gave him a *vindicatio* and also an *actio furti*, which show the almost proprietary character of the *potestas*, although modifications made it clear that there was no *dominium*. However, the normal remedies in the developed law were praetorian interdicts (*de liberis exhibendis et ducendis*).

(2) Originally a *filius* could own no property, because, like a slave, whatever he acquired he acquired for his *paterfamilias*. And until the Empire the only sort of property a *filius* had was the *peculium* (which has come to be known as *peculium profectitium*), or property of which his father allowed him the use, but which the father might take back at any moment. In the early Empire a series of changes began, and a *filiusfamilias* came to acquire a distinct proprietary position. Augustus introduced the *peculium castrense*, which embraced whatever the *filius* acquired on military service. This *peculium* was withdrawn from the *potestas* of the *pater* and the *filius* could dispose of it (just as if he were really *sui iuris*) *inter vivos* and by will, though until the time of Hadrian to dispose of it by will, or perhaps even at all, the son had to be on active service. It was only if the son died in the lifetime of his father without having disposed of it by will that the father took the property as if it were his own (*iure peculii*). After Justinian's legislation, however, he took it, if at all, by inheritance (*iure hereditario*).

Under Constantine came the *peculium quasi castrense*: whatever the son made in official employment was his own property, except that he could not dispose of it by will, a privilege only conferred by Justinian. Subsequently this *peculium* came to embrace everything the son earned in a professional capacity. Under Constantine also arose the *bona adventitia*; everything which the *filius* acquired as heir to his mother (*bona materna*) vested in the father, but he was so prevented from alienating any of it that it was a virtual usufruct, with the real ownership practically in the son. (Under Justinian the father did only have the usufruct, the son having *dominium*.)

Later this fund was extended to cover all property coming to the *filius* through the maternal line (*bona materni generis*), and property gained through marriage (*lucra nuptialia*), and by Justinian to all property of every kind except the *peculium castrense* and *quasi castrense* and the *peculium profectitium* derived from the father himself. In the time of Constantine a father, on emancipating a *filius*, retained absolutely one-third of the *bona adventitia*. Justinian altered the law: the father was to take a usufruct in half this property and the *filius* accordingly received the income of the remaining half during the rest of the father's lifetime and on the father's death enjoyment of the whole. Unlike the case with the *peculium castrense* and *quasi castrense* the *filius* could not dispose of *bona adventitia* by will till the death of the *paterfamilias*, nor alienate them *inter vivos* or charge them without his consent. Whereas a *filiusfamilias* was unable to possess either of the two *peculia*, the rules as to *bona adventitia* applied equally to her. (For succession on the death of the person in power, *post*, p. 298.)

As regards the *peculia* which he owned the *filiusfamilias* had all the remedies that a *paterfamilias* had in respect of his own property, and the funds were kept completely separate for legal purposes, *e.g.* when praetorian law made the *paterfamilias* liable for certain contracts made on his behalf by his son. The same rules no doubt applied ultimately in respect of *bona adventitia*. The various remedies would, however, in all cases probably be only *in factum*.

A contract between a *filiusfamilias* and his *pater* gave rise to a *natural* obligation merely. Unlike the case of a slave, however, a son's contract with a third person gave rise to a *civil* obligation (*i.e.* both the son and the third person were bound *civiliter*), though originally any benefit accruing under such a contract accrued to the *pater*, who could not be detrimentally affected by it (*post*, p. 317). As a matter of fact, though in theory a *filius* could enter into as many legally binding contracts as he pleased, it is improbable that people would be willing to deal with him save in two cases: (i) where he was contracting (as he might) on his own behalf in relation to the *peculia* which he acquired under the Empire; (ii) where the son was acting as his father's agent, and there was a reasonable prospect of making the father liable by means of an *actio adiectitiae qualitatis* (*post*, p. 373). A *filiusfamilias*, even when

under fourteen years of age, was never subject to guardianship (*tutela* or *cura*), and up till fourteen he had no capacity, for even his *paterfamilias* did not possess the *auctoritas* to give the child power to acquire or contract for *itself*. However, the child would not normally have any *peculium* (*profectitium* or otherwise) and the difficulty would scarcely arise.

A *filius* wronged by his father had (apart from express legislation protecting him) no legal redress. If the *filius* was wronged by a third person, it was normally the father and not the *filius* who could sue, though the *filius* could bring the *actio iniuriarum* (for insult) and a few other actions.

Wrongs by a son to his father would be a matter for family jurisdiction alone. Indeed, few obligations enforceable at law existed within the *familia*. However, in the second century A.D. mutual rights as to support and maintenance were enforceable between father and child by the *extraordinaria cognitio* under imperial legislation. In later law the father came under an enforceable duty to supply a *dos* for his daughter.

5. Termination of *Patria Potestas*

(i) By the death of either party, provided that, upon the death of the person in whose *potestas* the *filius* was, he did not fall under the power of some other ascendant; *e.g.* *A*, a grandfather, has in his *potestas* *B*, his son, and *C*, his grandson by *B*. *A* dies, *C* is not *sui iuris*, but falls under the *potestas* of his father, *B*.

(ii) By adoption, provided, in Justinian's time, that the *adoptio* were *plena*.

(iii) In the case of females, by marriage *in manum* (so long as that system lasted) into another family.

(iv) By the child's attaining signal public distinction; *e.g.*, in the time of Gaius, becoming a *flamen dialis* or a Vestal Virgin or, in the time of Justinian, a bishop or prefect.

(v) In the later law a father exposing his children, or giving his daughter in prostitution, lost his rights over them.

(vi) By either father or child's becoming a slave (subject to *postliminium*) or losing *civitas*.

(vii) If the father gave himself in adrogation to another citizen, the last-mentioned acquired *patria potestas* over the children also (*ante*, p. 117).

(viii) The sale of the child *in mancipii causa*, but in the

case of a son three sales were necessary. In classical law, however, there was a dispute between the schools in respect of noxal surrender. The Proculians maintained that *potestas* was broken only by the three mancipationes, whereas the Sabinians held that one was sufficient because the mancipation was not voluntary. In any case, whatever the due form, the son did not revert to *potestas* after working off the debt. In Justinian's law the point, of course, did not arise, noxal surrender of sons having been abolished.

(ix) The most common case of all, emancipation or the voluntary freeing of the child by the father. This, in the time of Gaius, was effected as follows: the object, as in the first stage of adoption, being to put an end to the agnatic tie by taking advantage of the provisions of the Twelve Tables, the first part of the ceremony of emancipation was exactly like that in an adoption; *i.e.* the child (if a son) was sold by means of a fictitious mancipation three times to a stranger, being manumitted *vindicta* after the first and second sale. (If the child was not a son but, *e.g.*, a daughter or grandson, one sale was enough.) The child was then *in mancipii causa* to the purchaser, and the second stage of emancipation was the freeing of the child from this quasi-slavery, so that he might not only escape from the *patria potestas* of his father, but become fully free. Obviously this might have been effected simply by the purchaser manumitting the child *vindicta*. But this was not the usual course, because in such case the purchaser, as *extraneus manumissor*, would acquire a right of succession to the child, which more properly belonged to the real father. The usual course, therefore, was for the third sale to be made under a trust (*fiducia*) that the purchaser would resell the child to the father, who would himself manumit him and so, as *parens manumissor*, acquire the succession rights and if the child was *impubes* become tutor. The form of emancipation was first simplified by Anastasius, who allowed it to be effected by imperial rescript, a course usually adopted where the child was away from home, and so incapable of going through the ordinary ceremony. Finally, under Justinian, emancipation was effected by a declaration by the father and son in the presence of the magistrate. In later law, at least, the consent of the child seems to have been required.

From the time of Constantine an *emancipatus* could be

recalled to *potestas* if he were guilty of *impietas* or gross ingratitude towards his father, and he would have to hand back any gifts conferred on him by the father along with freedom. The legal effects were presumably similar to those of *adrogatio*.

(B) Guardianship: *Tutela* and *Cura*

A person, although a freeman, a citizen and *sui iuris*, might still lack full legal capacity if subject to the control of a *tutor* because, e.g., of extreme youth, or to that of a *curator* because, e.g., of lunacy.

1. *Tutela*

Tutela was of two kinds —

- (i) *Tutela impuberum*.
- (ii) *Tutela perpetua mulierum*.

(i) *Tutela impuberum*

Every boy or girl who was *sui iuris* and under the age of puberty had to have a *tutor* whose *auctoritas* supplied the want of capacity in the pupil. But this was apparently not its original purpose : it was an institution primarily in the interests of the *tutor*, who was there to protect the property that would be his in case the child died before puberty. Hence under the Twelve Tables he was *tutor* who had the right of succession to the property. In the developed law the view changed completely and *tutela* became a true guardianship with heavy duties for the *tutor* and ample protection for the ward (*pupillus*). Whilst the interest of the *pupillus* was now paramount, it must be noted that the institution was concerned solely with his property : the care and control of the child itself, at least in the later law, was normally with the mother or some close relative, with the *tutor* having to provide from the property for the ward's maintenance.

(a) The classes of *tutela*.

(1) *Tutela testamentaria*. The normal tutor to a person *sui iuris* but under puberty was the clearly specified person appointed to be such tutor by the will, or by a codicil confirmed by the will, of the *paterfamilias*, by whose death the boy or girl in question became *sui iuris*. Hence a grandfather

could appoint by his will a tutor for his grandson only if the father had died or undergone *capitis deminutio*; since otherwise the boy would still be *alieni iuris*. The power to appoint was given to the *paterfamilias* by the Twelve Tables, and by *interpretatio* it became possible to appoint for *postumi sui*—in very much the same way as they came to be able to be made heirs by will (*post*, p. 250). In all cases it was necessary to make it clear for whom the tutor was to act, though the pupil did not need to be specifically named. Until Justinian's time certain formal words had to be used; e.g. 'I appoint Balbus tutor' or 'Let Balbus be tutor'. In ordinary cases the appointment by will was enough in itself to make the person nominated tutor on the death of the testator, but in certain exceptional cases, owing to some defect or informality, confirmation by the magistrate was necessary; e.g. if formal words were not used, or the appointment was made in an unconfirmed codicil, or for an emancipated son who had been appointed heir in the will; for, as *tutela* was a substitute for *patria potestas* and there was no *potestas* here, there was in strictness no right to appoint a tutor. A testator might, in general, appoint as tutor anyone who possessed *testamenti factio* and, since a tutorship was considered a public office, even a *filiusfamilias* was capable of holding it. A testator might appoint his slave to be tutor, at the same time giving him his freedom, and in Justinian's time the mere appointment carried freedom with it, unless the testator appointed his slave *cum liber erit*, in which case the appointment was void, because the testator showed by the use of these words that although he had the power to free the slave he did not intend to do so. On the other hand, the appointment of another person's slave was valid if made subject to the condition, 'when he shall be free', and where these words were omitted they were implied. The heir was bound, if possible, to purchase the slave and free him; until the *servus alienus* acquired his freedom in this or some other way, he could not be tutor. A Junian Latin was expressly excluded.

(2) *Tutela legitima*. An *impubes* to whom no tutor had been appointed by will would usually have a *legitimus* or statutory tutor; the statute in question being the Twelve Tables as interpreted by the jurists. The *tutela legitima* is either *agnatorum* or *patronorum* or *parentum*.

(α) *Legitima agnatorum tutela*. A person becoming *sui iuris* under the age of puberty and having no testamentary tutor had, under the provisions of the Twelve Tables, as his *tutor legitimus* his nearest male agnate or agnates, for if there were several agnates in the same degree they all became tutors. The reason why these agnates were appointed tutors by the Twelve Tables was that they would succeed as heirs to the ward's property on his death intestate and without issue, and the benefit of being able to protect such property for their own and for the general interest of the family became the burden of conserving and managing it for the ward. If there were no agnates, the tutorship originally passed, like the property, to the nearest *gentiles*. After the 118th Novel of Justinian this *tutela* devolved on the nearest *cognate* capable of acting as guardian instead of, as theretofore, upon the nearest agnate.

(β) *Legitima patronorum tutela*. If a master manumitted a slave under the age of puberty, he (and his children after his death) became that slave's patron and *tutor legitimus*; *legitimus*, not because the Twelve Tables expressly gave such *tutela* to the patron and his children, but by means of the interpretation of the jurists, since the patron and his children acquired rights of succession to the freedman under the statute. Where a holder *in bonis* manumitted a slave so that he became only a Latin, *tutela* was in the Quiritary owner even though succession was in the holder *in bonis*. This was a result of the *lex Iunia*, which put *tutela* of Junian Latins always in the civil law owner (as was the case with full *liberti*). This institution of guardianship by civil law for one who had not *civitas* seems a striking example of the Romans' not leaving such a person completely to the *ius gentium* where there was a good enough reason for intervention, and it probably shows the old idea of *tutela* to protect the tutor's interest still latently affecting lawyers' thinking. Where a slave was manumitted by a woman, she became *patrona*, but, since women could not be tutors till very late law, there was no *legitima tutela*: the tutor had to be provided by a magistrate.

(γ) *Legitima parentum tutela*. On a like analogy, a *paterfamilias* who emancipated a person in *potestas* under the age of puberty not only acquired a right of succession but became his *tutor legitimus*.

(3) *Tutela fiduciaria*. In the time of Gaius this term denoted two kinds of *tutela* arising with some form of trust (*fiducia*). The first was that which arose when in the emancipation of an *impubes* the ultimate manumission was made by the *extraneus manumissor* (*ante*, p. 127), who thereupon became the child's *tutor fiduciarius*, though, on principle, as he had the right of succession he ought to have been *tutor legitimus*. This was obsolete in Justinian's time owing to the change in the form of emancipation. Then *tutela fiduciaria* arose only in the second case, *viz.* where a *paterfamilias* emancipated a person in his *potestas* under the age of puberty and then himself died. Thereupon the unemancipated male children of the deceased became fiduciary tutors to the person who had been emancipated. For example, *A* has two sons, *B* and *C*, in his *potestas*; he emancipates *C*, aged eleven, and thereupon becomes *C*'s *tutor legitimus*. Next *A* dies and then *B* becomes his brother's fiduciary tutor until *C* attains fourteen.

The classification of *tutela* as *fiduciariae* has caused a great measure of doubt and dispute. The texts give no reliable reason for their separation from *tutela legitima*. Indeed, some writers refuse to treat *tutores fiduciarii* as distinct from *legitimi*. Probably, the reason for the confusion lies in the history of the Roman classifications: the first classification was made late in the Republic by Scaevola and thereafter numerous different classifications were suggested. Perhaps the *extraneus manumissor* was quite early regarded as a natural tutor at civil law (i.e. *legitimus*), but because of the lack of family ties and the responsibility placed upon him by the *parens* he was regarded as specially under a *fiducia* (and breach of the *fiducia* may have been regarded as particularly disgraceful). On the other hand, there is evidence that the *parens manumissor* was originally regarded as *fiduciarius* also and Gaius, even in his time, seems hesitant whether the *parens* was *legitimus* or *fiduciarius*. The jurists may have 'elevated' the *parens* to *legitimus* on analogy with the *patronus* and to contrast him with the *extraneus*, whom they now clearly termed *fiduciarius*. Once the latter category was recognised it was natural that the *liberi parentis manumissoris* should be so regarded because unlike *liberi patroni* they had no civil law right of succession: *tutela* may well have been imposed on them only at the time when they began to receive recognition for succession under

the praetorian system of *bonorum possessio*. It does, however, show that the term was now just a name to distinguish the *tutela* from *legitima* — there was certainly no *fiducia* on the *liberi*.

(4) *Tutela dativa*. In default of any other tutor, a tutor may be appointed by the magistrate (*tutor dativus*, to use a late term). Formerly the appointment was made at Rome, under the *lex Atilia*, by the *praetor urbanus* and a majority of the tribunes of the *plebs*; in the provinces by the *praesides*, under the *lex Iulia et Titia* (31 B.C.). But before Justinian's time tutors had ceased to be appointed under those laws (because, among other reasons, they contained no provisions to secure that the tutor did not waste the ward's property); and at Rome the appointment was by the *praefectus urbi* or the *praetor tutelaris* (a special officer who had been appointed by Marcus Aurelius), in the provinces by the *praesides*, after inquiry or, if the property of the pupil did not exceed 500 *solidi*, by the *defensores* (local magistrates). The latter were required to take security. Anyone with an interest in respect of the child or his property (*e.g.* a relative or even a creditor) could apply for the appointment to be made, and in some cases there was a legal duty to make such application (*e.g.* upon mothers or upon *liberti* for their patrons' children). The application would nominate someone for the tutorship and the magistrate, if satisfied, appointed him.

One case already mentioned was that of the 'tutor' informally nominated in a will: by imperial legislation such a person could be confirmed (in reality, appointed) by the magistrate so as to exclude a *tutor legitimus*, who would on general principles himself exclude the possibility of a *tutela dativa*. In classical law and earlier, there was sometimes a *tutor praetorius* even when another tutor existed, *e.g.* when there was litigation between the latter and the ward. In later law there could not be more than one *tutela* (though, of course, there could be more than one tutor — *contutores* acting jointly), and such cases were dealt with by a *curator* appointed for much the same job.

(b) Disqualifications and Excuses.

(1) Disqualifications. Certain persons could not be tutors even if they wished to be.

(α) Slaves, unless and until freed by virtue of a will appointing them. (β) *Peregrini*. (γ) Junian Latins by the *lex Iunia*, but *Latini coloniarii* could serve. (δ) Women, but exceptionally under Justinian a widowed mother (or grandmother) could demand appointment as tutor to her children (or grandchildren) on giving an undertaking not to remarry, renouncing the benefits of the *S.C. Velleianum* (*post*, p. 345) and giving a hypothec over all her property to protect the interests of the children. (ε) *Impuberes*, except for *tutela legitima*, and under Justinian those under twenty-five for all *tutela*. (ζ) Persons under mental or physical incapacity, e.g. deafness; *furiosi* might recover sanity, so they were not disqualified, just temporarily supplemented by a *curator* (earlier, a *tutor praetorius*, perhaps). (η) Soldiers and certain other officials. (θ) Creditors or debtors of the ward, under a Novel of Justinian. (ι) Anyone convicted of misconduct as a tutor would not be appointed as a *tutor dativus*.

(2) Excuses. Originally a *tutor testamentarius* had the *ius se abdicandi*, the right to refuse the *tutela*, which included the power to retire at will, but under Claudius the *ius* was cut down to a *ius se excusandi*, a right to be excused on set grounds by a magistrate as in the case of a *dativus*. The *tutor legitimus* had no right to refuse, but in very early law he may have had a right to assign the *tutela* by *cessio in iure* to another person willing to act; such a right, however, certainly did not exist in classical law (as it did in *tutela mulierum*, *post*, p. 140). In the Republic a tutor of either sort was under no duty to act, the *tutela* still being regarded more as a right. However, in the early Empire such a duty became imposed, at least for the *tutor testamentarius*. Gradually *tutela* became regarded as a public duty, probably mainly as a result of the *leges* that first introduced *tutores dativi* in the interest of the ward. Thus *dativi* and, long before Justinian, all tutors could only avoid the duty on recognised excuses. *Dativi* had, however, one special right, *potioris nominatio*: they could propose in their stead one more closely connected with the ward. The right had disappeared before Justinian.

The list of recognised excuses is massive. Thus, under Justinian at least, persons over seventy or with serious and permanent ill health, very poor or illiterate persons, certain office-holders, persons with a certain number of natural-born

children living or with three guardianships already, persons appointed by a spiteful testator or since become enemies to his family, certain professional men, were all among those excused. An excuse might be a ground for initial refusal or for subsequent retirement.

(c) The operation of *tutela*.

The tutor's duties included first of all the giving of security for proper administration, at least in some cases, and the making of a full inventory, at least from the classical period onwards. However, the major duties during the continuance of the *tutela* were twofold: (1) *administratio* or *negotiorum gestio*, the conduct of the ward's affairs; (2) *auctoritatis interpositio*, perfecting a transaction of the *impubes* by adding one's sanction.

(1) He had to administer the ward's property to the best advantage, but from early times he had great discretion in acting. However, his agency was always imperfect and indirect. Whilst he could represent his ward in litigation, perhaps even in a *legis actio* (and thus perhaps in *cessio in iure*), it is doubtful whether he could acquire or alienate for him by *mancipatio* and certain that he could not accept an inheritance for him, though he could obtain *bonorum possessio* from the praetor for him. Only in later law was the rule as to *hereditas* relaxed in the difficult case of the *infans* where *auctoritas* would be of no help. The tutor could alienate and acquire by *traditio*, accept and make payment of debts and invest money. Contracts were, however, personal in nature and he (not the ward) was himself bound and entitled under such contracts as he entered into for the ward. To evade such a liability the tutor could make use of a slave of the ward in cases where the praetor gave *actiones adiectitiae qualitatis* against the owner of the slave or he could merely give his *auctoritas* to a contract of the ward, but not if the ward were *infans*. At the end of the *tutela* the tutor would hand over all the ward's property and also rights of action, transferring the latter by making the ex-ward *procurator in rem suam* (an indirect method of assigning actions). Ultimately it was laid down that a creditor should not be able to sue the *tutor* on a contract reasonably made for the ward, but should have an *actio utilis* against the ward. No such general *actio utilis* would, however, exist for

the benefit of the ward : he would still have to sue as assignee.

Limitations were gradually put on the tutor's discretion in management. Thus in A.D. 195 tutors were forbidden to sell land in the country or unbuilt upon unless authorised by the will or, exceptionally, permitted by a magistrate. More legislation ordered the sale of hazardous and wasting assets, including houses, but ultimately Constantine forbade the sale of any valuable property, hazardous or not, without the authorisation or permission required by the *oratio* of A.D. 195. The tutor never had power to manumit or make gifts for the ward — that was not *administratio*.

Originally the tutor was probably only liable for *dolus* (fraud), but when the character of *tutela* changed he became liable for negligence (*culpa*) as well, and the standard of care expected of him was probably that which he customarily showed in his own affairs (*diligentia quam suis rebus*) — but it may have been stricter. At the end of the *tutela* the tutor might deduct from funds in hand a sum to pay his necessary expenses and to indemnify himself for his liabilities, and the praetor introduced an *actio tutelae contraria* for him to sue the ex-ward, e.g. where there was not enough in hand to pay all expenses.

(2) The tutor could supplement the ward's legal incapacity by giving his *auctoritas*. The act was the ward's, not the tutor's as in *administratio*. The authorisation merely certified that the act which the ward performed was fully effective at law. Whether or not a special form of words was originally necessary, it was certainly not so in classical and later law. However, the presence of the tutor and his oral declaration of assent were necessary. The giving of the *auctoritas* could not be conditional, though the ward's transaction could, of course, be. Ratification had no effect, nor had a written authorisation from an absent tutor. It was, therefore, probably only in important matters that the procedure would be used — most persons would do business with the tutor directly as *administrator*.

The ward could do any act which involved unqualified benefit to himself and he needed no *auctoritas*. If he entered into any bilateral contract on his own, then he could not be sued, but if he (or his tutor) sued upon it the other party could counterclaim. If a loan was made to the ward without *auctoritas*, the ownership passed but no liability to repay was created.

If payment was made of a debt to the ward alone, the debt was still existing and enforceable, but an action upon it could be met by an *exceptio doli* to the extent of any money (or benefit derived therefrom) still remaining with the ward. Property lent to an *impubes* without *auctoritas* could presumably be recovered by normal proprietary actions, but there would be no contracted liability for loss or damage.

Originally the *auctoritas* could be given to any act which the ward could physically perform. As most acts involved merely a form of words this meant that an *infans* (i.e. one who could not speak) could not effect any transaction in this way. As time went on and the tutor's powers of administration grew, the emphasis changed from ability to speak to ability to understand (*intellectus*), but this probably had no great effect until either late in or after the classical period. Gradually, however, the notion grew of the tutor's supplying merely judgment, not understanding as well, and one hears of children *infantiae proximi* (near to 'infantia') as well as *infantes*: the former were those who could speak, but hardly understood. Other *impuberes* were *pubertati proximi* (near to puberty), but liberal principles restrained the tendencies to class *infantiae proximi* with *infantes* to any great extent, and only *infantes* remained really without capacity under Justinian. He, however, obviously had *intellectus* in mind when he fixed *infantia* as ending at the end of the seventh year instead of the physical test. The complete incapacity of *infantes* (e.g. to accept an inheritance) was gradually rectified by imperial legislation giving wider powers to the tutor.

A tutor could not give *auctoritas* in any transaction in which he had an interest. In such cases a joint tutor could authorise the transaction if there were *contutores*. Otherwise a *curator* (or earlier, perhaps a *tutor praetorius*) would have to act. A tutor could never be forced to give his *auctoritas*, but he would be liable on the same principles as in *administratio* for fraudulent or negligent giving or withholding of *auctoritas*.

(d) Protection of the ward.

(1) The tutor's duty to make an inventory before administration was in existence in the classical period. The inventory was taken under public supervision and had to be made except where the testator gave exemption.

(2) Also before administration certain tutors had to give security (*satisdatio*) that the property would be safe (*rem pupilli salvam fore*). This would consist of a *stipulatio* (*cautio*) to that effect by the tutor, backed up by stipulations by sureties (*fideiussores*): the stipulations would be so taken that the ward would be able to sue on them directly or, in some cases, by an *actio utilis*. A testamentary tutor never had to give security, nor did a *tutor dativus* in classical law; the former because the testator trusted him, the latter because a high magistrate had investigated the propriety of the appointment. A *tutor legitimus*, however, could not act till he had given security, a rule arising in the first century A.D., and the case was the same with the *fiduciarius* apparently. However, a patron or his *liberi* might be excused from giving security in a proper case, and the rule was probably similar in the case of the *parens manumissor*. In later law the rules remained the same, except that tutors appointed by *defensores* had to give full security.

(3) Various procedures arose for the removal or control of a tutor for misconduct or incompetence. The *crimen suspecti tutoris* came from the Twelve Tables and was probably available, at first, only against a *tutor testamentarius* and, perhaps, also only for *dolus*. The accusation (*postulatio*) could be brought by anyone (including a woman) except the *impubes* himself. The whole history is uncertain, but two other procedures appear to have been evolved: a power of *remotio* (dismissal) by the magistrate without the formalities of the *crimen* (perhaps appropriate for *tutores dativi*) and a power to appoint a *curator* to supervise the future *administratio* (perhaps in the case of *legitimi*). In any case they were all fused in late law into the one institution of the *crimen* available against all tutors. Under this, after *postulatio*, the tutor was suspended from acting during investigation. In the normal case, if he was found guilty of misconduct or incompetence, he was dismissed. If *dolus* was found, he became *infamis*. A *patronus* would not normally be dismissed (nor a *parens*) and was shielded from *infamia*: it would be usual to appoint a *curator* to act alongside him.

(4) When *tutela* ended, a delictual action for double damages, *actio de rationibus distrahendis*, lay to the ward for a tutor's conversion to his own use of the ward's property. It

probably lay only against *legitimi* at first, but in late law, if not before, against all tutors, but not against their heirs.

(5) Also at the end of *tutela*, the pupil could compel the tutor to render accounts and hand over property, and from the latter part of the Republic an *actio tutelae*, quasi-contractual and *bonae fidei* in nature, lay for fraud or negligence. Conviction in the *actio* (later called *tutelae directa*) involved *infamia*, but presumably only for *dolus*. It may have lain originally only against *dativi*, then later against *testamentarii* and later still *legitimi*. It lay only where the tutor had acted, but from the second century A.D. an *actio utilis* lay where he failed to act at all. The *actio tutelae* took priority over actions for all unsecured debts and obligations.

(6) There were the constitutions from A.D. 195 restricting the tutor's powers of alienation.

(7) From the time of Constantine the ward was given a tacit *hypotheca* over all the tutor's property for any claims he might have.

(8) There might be other liabilities on the tutor under the general law, *e.g.* in delict.

(9) If a tutor was appointed by *defensores* and security had not been taken or not sufficient taken, an *actio subsidiaria* lay against those magistrates for any balance of loss not otherwise recovered.

If *contutores* existed (and they often shared out the various fields of *administratio* amongst themselves) then only those actually embezzling were liable on the *actio de rationibus*, and those who had actually acted in the transactions complained of were liable on the *actio tutelae* before those who had not. A person who acted as tutor when not entitled to was liable on an *actio protutelae* on the same principles as the *actio tutelae*.

(e) Termination of *tutela*.

(1) By the removal of the tutor from office by the magistrate.

(2) By the death of pupil or tutor.

(3) By the pupil's attaining puberty (*ante*, p. 105).

(4) By the retirement of the tutor from office for one of the sufficient reasons or, originally, by resignation at will by the testamentary tutor.

(5) In the case of a tutor appointed until a condition was accomplished or *ad certum tempus* (to a certain point of time), by the fulfilment of the condition or the expiration of the period.

(6) By the pupil's suffering any kind of *capitis deminutio* (change of status).

(7) By the tutor's suffering *capitis deminutio maxima* or *media*, or, in the case of the *legitimus tutor*, even *capitis deminutio minima*; the reason being that *capitis deminutio minima* involved the break of the agnatic tie, and on this the *legitima tutela* (at any rate of the agnates and parents) depended.

(ii) *Tutela perpetua mulierum*

Right down until after the end of the classical period there existed another form of *tutela*, that of women, free and freed, *pueres* and *impubes*. As an institution it had its roots in the time when *patria potestas* first appeared, as did *tutela impuberum*. In a society built on the *familia*, itself resting on *potestas*, *tutela* seems to have been a substitute for *potestas* in cases where a free person was *sui iuris* and yet not a *paterfamilias* able to act. The two *tutela*e were probably originally one institution and the original form was certainly *legitima*, the *tutela* of the agnates (before the days even of manumission and emancipation, and thus of other *legitimae*). The purpose was preservation of the family property and the essence the *auctoritas*. As it was, the connexion between the two lasted as long as they both existed. Thus Gaius varies from talking of *tutela* of *impubes*, male and female on the one hand, of adult *mulieres* on the other to talking of *tutela* of male *impubes* on the one hand, of *mulieres* of all ages on the other; and when Claudius abolished *tutela agnatorum* of women, he abolished it for female *impubes* as well as adults by the more inclusive term. Of course, differences arose: for adult women there arose no need for *administratio* and they came more and more ready to conduct business as the Republic wore on; again, the peculiar institution of *manus* produced special rules.

Despite the fact that women attained an eminence of regard and a freedom of person much greater than they enjoyed in other ancient civilisations — particularly with the emergence of free marriage — *tutela* continued down to the fourth century and that continuance has puzzled scholars ever since, as indeed it puzzled even Romans such as Gaius. Perhaps a deep-seated male notion of slight instability of judgment in women did remain from early patriarchal times and lingered long enough for Augustus and his successors to use the decaying

institution for their policy of promoting the birth-rate by means of the *ius liberorum*. Certainly *auctoritas* in all except *tutores legitimi* seems to have become a mere formality, compellable by the woman before the court.

The *tutela* of women may be classified broadly in the same way as that of *impuberum*.

(1) *Testamentarii*. The *paterfamilias* whose death left the woman *sui iuris* could appoint as he could to an *impubes* and the rules were the same as there. However, there was another special case: the husband with *manus* over her could also appoint for her and in this case he could appoint 'in blank', allowing her to choose her own tutor (*tutor optivus*). This *optio* could be limited by the husband to a tutor for a particular occasion or business or given generally, and it included the power to change her tutor at will, unless expressly cut down.

(2) *Legitimi*. As with *impuberes* these were agnates, patron and *liberi*, and *parens manumissor*. However, these *legitimi* retained a right to make *cessio in iure* of the *tutela* to another who then acted as tutor on their behalf and was called *cessicius*. He was, though, no more than their proxy: their death or *capitis deminutio* deprived him of *tutela* and his left them full tutors again. Claudius abolished *tutela agnatorum* for all women (Constantine restoring it for female *impuberes*). As this was the only *tutela* that had any real power over the woman, perhaps he felt that control by agnates (one of whom might well be her own son were she *in manu*) was now incompatible with the dignity of an *ingenua*. No such reason would exist to remove control from the patron of a *liberta*, and sentimental reasons might retain it for the *parens manumissor*.

(3) *Fiduciarii*. As before, there was another case for women beyond the two for *impuberes*. This was the tutor who became such by being the manumissor of the woman's choice in the collusive *coemptio fiduciae causa* (*ante*, p. 102). The purpose would be to rid herself of the *tutela legitima*. Only if she did so could she make a will before Hadrian's time — the *tutela* remaining still a method of protecting the *legitimi* from losing their succession rights. Also, she would thus be able to have a tutor who was compellable and she could, moreover, lose the burden of maintaining family *sacra* by such a *coemptio*. There are problems as to the process, however. The *coemptio* (even for marriage) had to be with the existing tutor's *auctoritas*,

he would be *legitimus* and as such his *auctoritas* could not be compelled except for transactions which the magistrate considered necessary and urgent. This, of course, might well prove a stumbling-block: the tutor a woman wishes to change for one more amenable is likely not to be amenable to the change; and many a tutor, however amenable generally, might not like the notion of the complete loss of an assured succession, for she could now make her will and her *capitis deminutio* would still deprive him of civil law intestate succession even if she made no will. It can only be assumed that during the Republic the praetor, if he was satisfied in all the circumstances, came to force a *legitimus* to authorise a *coemptio* (perhaps whilst it was still used only for marriage) and this was used as the escape route from *tutela legitima*. Perhaps also, the praetor was less ready to force the *auctoritas* of a patron or of a *parens* than he was that of an agnate and this would again account for the legislation of Claudius.

It became settled that *fiduciarii* could not transfer to *cessicii*.

(4) *Dativi*. The principles were in essence the same as with *impuberes* and they rested on the same original statutes. However, various *senatusconsulta* and the 'marriage' *lex Iulia* of 18 B.C. made considerable differences. Whereas an *impubes* could not apply for a tutor, the woman herself — and she alone — could apply under the *lex Atilia*, and under the special legislation she could apply for a tutor to be specially appointed even whilst she had a tutor. In particular, this power of appointment existed where the original tutor was absent or was *impubes* and the praetors construed absence very liberally so that any transaction the woman wanted carried through could be effected. The one restriction on this power was contained in the first *senatusconsultum* — a *liberta* could only apply for a tutor in the absence of her patron (or his *liberi*) if the latter's interest was to be in no way prejudiced (*e.g.* to accept an inheritance, but not to make a will). It was another example of the special protection of this *tutela legitima*.

The rules as to disqualifications and excuses were basically the same as for *impuberes*. There was no liability for wrongdoing because there was no *administratio* and because *auctoritas* was compellable and thus freely given, except in *legitima tutela* in which the power to assent or refuse was admittedly still for the tutor's own benefit. There were thus no actions

either. Any wrong a tutor might do would be a wrong arising under the general law. The *auctoritas* was not necessary for alienating *res nec Mancipi* (*post*, p. 155), for receiving payment of a debt and giving a receipt, for making a loan, for suing on a praetorian action. However, it was needed for alienating *res Mancipi*, for making a release by fictitious receipt (*acceptilatio*), for suing on a *iudicium legitimum* (*post*, p. 456), for making a will. It was also, and most importantly, necessary before a woman could be bound by any contract. The *auctoritas*, as already said, could be forced, except from a *tutor legitimus*. With regard to a will, an *ingenua* could not make a will at all until Hadrian's time, and then only with *auctoritas*; a *liberta* could always do so with her patron's *auctoritas*. Lack of *auctoritas* made the will invalid at civil law; lack of that of a patron, his *liberi* or a *parens manumissor* barred even the praetorian grant of *bonorum possessio*.

Tutela mulierum was dispensed with under the Augustan marriage legislation if a woman had the *ius liberorum*, which meant her having borne three children, legitimate or from concubinage, or, in the case of a *liberta* in *tutela legitima*, four. The whole institution died out in the fourth century A.D. and did not survive even until the imperial grant of *ius liberorum* to all free women in A.D. 410.

2. *Cura* (also known as *Curatio* and *Curatela*)

Cura was another form of guardianship which, although it had marked similarities to *tutela*, was quite distinct in being much less general in application (at least at first) and in being derived from various different institutions. *Cura* was, therefore, a sort of residual conception: whenever a particular form of guardianship was found to be necessary, it would be called *cura*. So it is that, whilst there were similarities between the various forms with influence one on the others, and particularly influence from the more fully worked out *tutela*, there were really no general principles.

(i) *Cura furiosi*

A lunatic (*furiosus*) was completely incapable of any legal act in the same way as an *infans*. The Twelve Tables put a *furiosus sui iuris* in the *cura* of his agnates (or *gens*), and this *cura* resembled a modified *potestas*: they had control of his

person as well as of his property. The praetor intervened to appoint a *curator* in cases where there was either no *cura legitima* or an unsuitable one and would especially appoint anyone nominated by the will of the *paterfamilias*, there being no *cura testamentaria*. A man would not be manumitted or emancipated when mad and, if he became mad after being freed, the magistrate would appoint. The *curator* '*dativus*' may not have had authority at civil law like the *legitimus* because the praetor may have acted on his own authority, not on any *lex* as with *tutela*. In any case in post-classical times all curators became *dativi* in the sense that even relatives had to be officially appointed: and by then the acts of the *curator* would be fully valid.

The *cura* consisted solely of *administratio*: there could be no *auctoritas* because there was no capacity at all in the *furiosus*. The *curator* would have at least as full powers as the *tutor impuberis* and may indeed have had greater powers under the Tables to perform formal acts on behalf of the *furiosus*. The same rules as in *tutela* applied as to security, disqualifications and excuses: the remedy of the recovered *furiosus* (or of his heirs, if he did not recover) would be the *actio negotiorum gestorum* with the same priorities as the *actio tutelae*, and the *curator* would have an *actio contraria* for his expenses and liabilities. The *formula* was probably *in factum* at first, later *bonae fidei*, and the action arose in the late Republic.

What was lunacy was probably always a question of fact, never subjected to rules by the law. A *furiosus* might be subject to lucid intervals and in such he recovered capacity automatically and could do any act, including making a will. On reversion to lunacy, it was settled under Justinian, after much controversy, that the *curator* recovered his powers without need for reappointment by a magistrate. Those who were not lunatics may have received curators from the praetor and the *cura* would then operate with effect only in the *ius honorarium*. In late law, however, all severe mental illness, and even physical disabilities such as those of the deaf mute, were treated alike and received *cura*. A *furiosa* no doubt always needed a *curator*, *tutela* being useless.

(ii) *Cura prodigi*

The Twelve Tables established another *cura*. One who received property on an intestacy and proceeded to waste it

was subjected to the *cura* of his agnates (or *gens*). The question of deciding whether he was *prodigus* was perhaps a matter for the family council originally, but was ultimately, at least, for the praetor who issued an *interdictio bonorum*. The *curator* had control and *administratio* of the property, not custody of the person. Gradually the praetor extended the institution on his own initiative to the case of the *libertus prodigus*, giving *cura* normally to the patron, and to the case of one who was prodigal with property left him by will. Curators appointed in such cases could only act at praetorian law, whereas the *curator legitimus* under the Twelve Tables had powers at civil law, perhaps as great as a *curator furiosi*. Here again *cura legitima* became gradually swallowed by *cura 'dativa'*, and in late law all curators achieved their powers by magisterial decree. The *cura* lasted apparently until the praetor formally revoked the *interdictio* for cause shown.

The capacity of the *prodigus* and the powers of his curator are little known. The *prodigus* seems to have been like an *impubes* in that, unlike a *furiosus*, he could receive property and take part in acts purely for his benefit; whether he could enforce bilateral contracts is uncertain: they clearly could not be enforced against him. He could make no will in any circumstances, but he may have been able to accept an *hereditas*, at least in late law. It is doubtful whether there was ever any procedure, as in the case of the *impubes*, whereby his incapacity could be supplemented by an *auctoritas* or *consensus* of his *curator*. What constituted prodigality was again a matter of fact to be decided by the praetor. The rules of *tutela* that applied to *cura furiosi* applied here also, and the actions were again *negotiorum gestorum*.

(iii) *Cura minoris*

Originally as soon as a boy reached puberty he achieved full capacity at civil law. This grant of independence at so early an age proved most dangerous, and around 200 B.C. a *lex Plaetoria* (or *Laetoria*) was introduced. It created, it seems, a noxal action that was *popularis* (i.e. could be brought by any *civis*), was for a penalty and involved *infamia*. The action lay for the fraudulent taking of advantage of anyone, male or female, under the age of twenty-five (*minor* or *adolescens*). The praetor expanded the policy of the *lex* considerably by giving

an *exceptio* on it against the enforcement of any contract that in fact was to the minor's disadvantage whether or not there had been fraud. More importantly still the praetor was very ready in such circumstances to give his remedy of *restitutio in integrum* to restore a minor to his position before the transaction. This, of course, played havoc with the minor's credit: no one would seek to strike a bargain with him for fear that that bargain might be held a hard one, struck only because of the youth's inexperience. It therefore became the practice for persons dealing with minors to insist on the presence or assent of some person whom the minor could trust so that it would be more difficult for the minor later to allege that he had been tricked or had been injudicious. Such presence or assent had no inherent legal effect like the tutor's *auctoritas*; but normally it would be very strong evidence of the fairness of the bargain when made and would more than balance the sympathetic praetor's way of thinking that a bargain which had since turned out disadvantageously for a minor was probably unfair to him at the time of its making. Whether or not the independent adviser became popularly known as a curator, curators were probably appointed by the praetor for particular temporary purposes, *e.g.* where a tutor was rendering accounts. M. Aurelius, however, made a considerable change: minors could now apply for the appointment of a permanent curator. This did not prevent the minor from exercising his full, independent capacity at civil law in cases where the other party was prepared to deal with him (*e.g.* ordinary everyday sales with money passing at the time). However, it would be rare for any important transaction to be effected without the curator's being present or at least signifying his prior assent. This assent (*consensus*) was less formal than *auctoritas*. The *consensus* was still not an absolute shield against *restitutio*, but that remedy would now be less likely to be given unless there was clear fraud affecting minor and curator alike or there was collusion with the curator. The curator would not have any power of *administratio* without the invitation of the minor himself, and he would then act as agent or *procurator* of the minor rather than strictly as curator. The remedy would be *actio mandati* (or perhaps *actio negotiorum gestorum*).

Later the character of the *cura* changed and came closer and closer to *tutela impuberum*. More and more minors applied

for curators and more and more gave them *administratio*. Soon after the classical period a minor with a curator became incapable of incurring liability without that curator's *consensus*. The curator, like the tutor, achieved greater powers of *administratio* and this function became more important, it seems, than the giving of *consensus*, which would now be used primarily for formal acts such as accepting an inheritance. It should be noted that whereas *consensus* could perhaps be given by writing and in absence it always had to precede the transaction: the curator could not ratify the act, it was for the court to decide whether it was valid in the circumstances. To the end it seems that a curator was only appointed at the instance of the minor, although under Justinian it must have been almost invariable for such an appointment to occur. The rules of *cura minoris* were, as with the other *curae*, the same as to security, excuses and disqualifications as in *tutela*, and the remedies lay in the *actio negotiorum gestorum*.

(iv) Other cases

There were many other *curae*, mostly praetorian in origin. Thus the *tutor praetorius* of classical law, appointed temporarily to replace a tutor unable to act, became a curator in late law. Again, a poor or sick tutor might be supplemented by a curator who was more than just his agent, but a full guardian. Litigation between ward and tutor also necessitated the appointment of a curator to help the *impubes*. While a child was *en ventre sa mère* a curator might be appointed to protect and administer property due to go to it on birth, and the property of a *captivus* might also be cared for by a curator.

IV

Capitis Deminutio

Caput to a lawyer meant the standing of a person in the view of the law and this standing might be lessened (*deminutio*) by various legal acts. In the developed law there were three types of *capitis deminutio* — *maxima*, *media* and *minima*; sometimes, however, the terms *maior* and *minor* are variously used in dual classifications. *Maxima* involved the loss of *libertas*;

media of *civitas*; *minima* of *familia*. Now the first two are clearly severe losses and the effects are clear. Enslavement means total destruction of the *caput* (subject, of course, to *postliminium*): manumission and pardon gave a new *caput*. Loss of *civitas* (apparently regularly called *capitis deminutio* only where it was penal as in *deportatio*, not, e.g., in joining a Latin colony) would not affect *ius gentium* relationships and obligations, but would break *conubium*, *commercium* and *familia*.

However, the major difficulties come with *minima*. This in the developed law was called *permutatio* (change) of *familia*, not loss of it; no *civis* could be without *familia*. Yet originally it did mean a very definite loss, a loss of membership of a family unit upon which one very greatly depended: one's new *familia* — consisting of oneself — would be poor consolation when one was faced with having to live in an early community which was entirely based upon a family system. By the time of the Twelve Tables independent existence must have been possible, and even occasionally desirable, else the severing of *potestas* would not have been provided for the benefit of the *filius*; yet *emancipatio* must still have been a possible punishment, and a real one, for a disobedient child. Later, of course, it became a boon, a chance to lead an independent life, and the praetor's recognition of *cognatio* in preference to *agnatio* started a process that gradually cleared away all the disadvantages of emancipation. *Emancipatio* was, in fact, the essence of *capitis deminutio minima*. The other cases of change of *familia* all seem approximated to it: *adoptio*, *manus* and *adrogatio*. All involved a change of agnatic relation and of *potestas*. The difficulty, however, comes with the case of *mancipium*. Gaius says that entry into it and manumission therefrom constituted *deminutio*, but *potestas* was only in suspense during *mancipium* — it was lost only by the relevant sale under the Twelve Tables or its *interpretatio*.

Investigation of the procedure for *adoptio* is instructive: the *patria potestas* was lost by the third sale; the *mancipium*, however, kept the child *alieni iuris* so that the *cessio* was effective to give the new *pater potestas* and the child its new *familia*. The *mancipium* was sufficient to prevent the child's ever becoming a *paterfamilias* and thus requiring *adrogatio*. It all seems to indicate that the Romans were really only concerned with the term to describe the normal consequences of

certain legal acts, and close analysis of the working of the idea is not likely to be very productive.

The effects of the *deminutio* have been or will be described in each case, as also the praetorian methods of evading those effects and the gradual elimination of many of the effects by later legislation, *e.g.* in usufruct (*post*, p. 213). One interesting example of how the Romans thought is the case of the Vestal Virgin and *flamen dialis*: they passed out of *potestas* without *capitis deminutio*, thus anomalously keeping their *familia*.

PART THREE

THE LAW OF PROPERTY

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I

The Term 'Res' and its Classification

It would be a mistake to regard the word '*res*' as having any definite meaning for the Roman jurist. He was using perhaps the commonest Roman word of all and he was not accustomed to restraining himself from using it as variously as the layman did. And the term certainly had wider and more various meanings than any English counterpart. According to its context it might be translated as 'thing', 'asset', 'circumstance', 'event' or 'affair', besides any special meaning it could have, such as 'lawsuit'. One has only to investigate the term '*respublica*' (often merely '*res*', in fact) to see just how far the word could be stretched.

An example of this variation of meaning can be drawn from the law of actions. A primary distinction there is that between actions *in rem* and actions *in personam* (*post*, p. 453). The distinction is not uncomplicated, but the basis of it would seem to be in the form of phrasing the claim. If the plaintiff claims an object or objects (or a right in respect of it or them) and the defendant is concerned (almost incidentally) because he is at present in control of it or them, then the action is *in rem*: if the claim is essentially concerned with the conduct of the defendant — a promise, an injury, a detention are examples — then the action is *in personam*. In both actions damages are the primary remedy and the interest of the plaintiff is normally the criterion of those damages. In the distinction, '*res*' is clearly used in a sense close to our meaning of 'property'. Yet in another procedural distinction, that between reipersecutory and penal actions, the former type of action will include many actions *in personam* as well as *in rem*. Here the *res* is

merely the compensation or reparation to which the plaintiff is entitled, as distinct from the penalty he may be lucky enough to secure on account of the wrongdoing of the defendant. It is clear then that the meaning of '*res*' in its context will depend very much upon what it is expressly or impliedly being contrasted with.

Now, in general, the Romans had no fundamental contrast for the term except (on one front) with '*persona*'. It was quite clear that a free person was not and could not be a *res*. The slave, as has been seen, was, of course, a *res* and it is he that makes the distinction one of interest and importance. Otherwise, however, a freeman is in no sense a *res* (not even his body): the history of the extension of the delict of *damnum iniuria datum* to cover cases of injuries to the body of a freeman shows this admirably. Even in death, it seems, the body could not be regarded by the law as a *res*.

Historically speaking, it seems safe to regard '*res*' as originally designating some physical object, and if the term can be said to have any primary meaning it must be this. Perhaps the way in which the earliest *iura*, the rustic servitudes, were treated very much as if they were physical objects, particularly in *mancipatio*, is evidence of the gradual extension of the term to include very many intangible entities. These intangibles were, of course, creatures of the developing law. When their existence was clearly established it was only natural that they should be ranked with the original *res*, at least for some purposes.

Now nearly all physical objects are actually or potentially desirable and advantageous and have some value in life, however infinitesimal or conjectural. Speculating whether this is a universal characteristic is pointless — it is in any case so nearly so that the 'asset' notion of the *res* is natural and prominent. Moreover, it is this characteristic that primarily affects and interests the lawyer. Thus, when the classical jurists think of *res*, they will naturally include in the notion those legal intangible creations that have a definite value in social and economic life. *Iura*, therefore, came into the term '*res*', but this in no way warrants its being treated as an abstract term signifying an economic interest. When the *ius* is treated as a *res* it is definitely equated with physical objects: the debt stands alongside the slave or farm or cart, it is made almost

into a concrete notion. The economic interest in the debt, the money or goods to be forthcoming under it, is quite distinct, at least for this purpose.

So it seems that, at least by the classical period, *obligationes* could quite readily be classed as *res* for some purposes. The fact that many *obligationes* were transmissible to and against heirs along with physical objects would make such a classification very reasonable. Yet the process could be only partial. An *obligatio* was never directly assignable in the way that physical objects and even some servitudes and similar rights were, and the notions of *dominium* and *possessio* were totally inapplicable to it. It is, therefore, not surprising that the jurists tended to be inconsistent. Gaius can therefore in II. 14 include it in *res incorporales*, whereas when he deals with the adrogation of a freeman in III. 83 he can treat it as separate from *res* both *corporales* and *incorporales*. This latter passage is a key to understanding the whole development. On an adrogation it had long been clear that physical objects would pass with the *adrogatus*, and rights of way and the like attached to them would soon have been associated in the passing. A natural sequence would have resulted in usufructs passing also but for the effect of *capitis deminutio* on this institution; but the ultimate extension, however, and perhaps a very daring one at the time, would come with the *obligatio*. A similar history seems to have befallen the *hereditas* (itself regarded by the jurists as a *res incorporalis* distinct from its constituents). Early Romans looked only at the tangible things in talking of an inheritance — apparently only those passed to the heir originally.

The explanation then would seem to be that the jurists, acting possibly under the influence of philosophy, were prepared to include obligations generally within the *ius rerum*, but in fact they all promptly dispatch them to a region of the subject where they are totally separate from *res corporales* and even from the various *iura* directly attached to those *res*. *Obligationes* are, therefore, just an extension of *res*, the final extension, and the *iura*, which constituted an earlier extension and are indeed treated along with tangible things, seem to be very much in the nature of an appendage to those things, the basic *res*.

If one regards the incorporeal things as extensions, one is

not driven into regarding '*res*' as an abstract term, as an 'interest' or a 'right', nor does one have to regard the jurists as muddling their ideas when they clearly treat the physical object, not the interest in it, as the *res*. To do so is to impose modern conceptual thinking (which on this point is of very questionable value) upon the expressions of the practical Roman mind.

Besides the classification into corporeal and incorporeal things there exist several other more or less important distinctions. Both Gaius and Justinian in their Institutes begin by dividing things into *res in patrimonio nostro* and *res extra patrimonium nostrum*, without defining the terms. *Patrimonium* meant property that could be owned privately and was the subject of private law: it would include property owned by the State, the people or public bodies when their ownership was on the same level as that of the private citizen and when there was nothing in the essence of the property that prevented its being alienated to any person or body. The distinction between *res in commercio* and *res extra commercium* is basically the same, the test being the thing's capacity to be assigned.

Among the *res extra patrimonium* are the following —

(a) *Res omnium communes*: this category appears in Justinian, but not in Gaius. It comprises air, running water, the sea and ultimately the seashore. As such they cannot be owned. However, a bucketful of water from a stream or from the sea can be appropriated, presumably by *occupatio*, and theoretically air in a container could be also. With the exception of the seashore the position could scarcely be otherwise, practically speaking, and it seems quite natural for Gaius not to bother with it.

(b) *Res publicae*: these are objects which are owned by the people or the State and which are solely for the use of people generally. Highways and rivers and ports are examples Justinian gives. The subsoil of the first two seems to have been *in patrimonio*, whilst the banks of rivers were privately owned but subject to a right in the public to use them whilst using the river. Streams and even small rivers could be owned, but whether the criterion was size or navigability or just the tendency to dry up is not clear.

The seashore presents difficulties. The rules seem to be

fairly clear : no one owns it, all may use it and have access to it, but some may have licences to put erections such as shelters on it. Whether one classifies it as common or public really does not seem to matter very much and discussion of it appears mere mental exercise.

(c) *Res universitatis* : this is property of public bodies other than the people or the State and is again for general public use. Thus municipal theatres and parks are prime examples. Justinian, who seems to revel in all these distinctions, distinguishes them from *res publicae* whereas Gaius would seem not to do so.

(d) *Res divini iuris* or *res nullius* : Gaius makes the distinction between *res divini* and *res humani iuris* much earlier than Justinian. The reason would seem to be that to the pagan Roman the land (for these *res* were all immovables) belonged directly to the gods, whereas the Christians would be quite happy to regard the land as vested in the Church in the same way as public land is vested in the State. However, Justinian keeps the old attitude of the law and retains the sub-classification into (i) *res sacrae*, land used for the benefit of the gods generally, e.g. temples, and in Christian times, churches ; (ii) *res religiosae*, land used for the burial of human beings, pagan Rome being most concerned with care for the dead and the cult of ancestors and Christian Rome being content to continue the legal rule, the land being hallowed ; (iii) *res sanctae*, those parts of the city that were essential to its safety, such as gates and walls, and were thus specially dedicated to protecting deities in pagan times. Most of the rules relating to these *res* belong to public rather than private law, criminal sanctions being very heavy for violations. However, 'religious' land was sometimes of concern in private law and there were elaborate rules as regards who might bury and where and also about the consent of the landowner.

An ancient and very important distinction is that between *res Mancipi* and *res nec Mancipi*. Its importance lay in the transfer of property and it continued to dominate the law of conveyancing right down till Justinian's time. Gaius has left us a comprehensive list of *res Mancipi*, but no explanation of it. The *res* included are : slaves, beasts of draught and burden, Italic land and houses built thereon, and rustic praedial servitudes in respect of such land. That they were of extreme

importance in the age when they originated is obvious, as is the locating of that age in a community living by virtue of agriculture. Numerous suggestions as to the exact criteria for membership of the list have been made, and the census and military considerations may well have played their part in its formation, but no definite conclusions are possible. However, it does seem that land and rustic servitudes may have been later additions than the slaves and beasts, though almost certainly before the Twelve Tables.

Res Mancipi had to be transferred by special ceremonies for the transferee to become owner. If *mancipatio* or *cessio in iure* were not used, then the ownership would not vest until the proper period of prescription had run. This was a cumbersome necessity, especially in respect of movable objects. It is therefore not surprising that there was a tendency to restrict the list as the Republic developed. Thus no other beasts than the original horses, oxen, asses and mules (Gaius's examples seem to be comprehensive) were added to the list, not even elephants and camels broken to draught or burden; and it was even disputed whether the original animals were *res Mancipi* from birth or from breaking in or even from the age normal for breaking in. Rustic servitudes also were probably restricted in the list to the original four (*iter, actus, via* and *aquaeductus*), later ones being treated along with their urban brethren. Land, however, did not suffer in the same way. The explanation is probably that whereas the other members of the list became less and less distinguishable on grounds of utility or value from *res nec Mancipi*, land retained its unique qualities as property and justified more formal modes of conveyance. Besides, *mancipatio* of land had less drawbacks than that of movables and even had some advantages. As Rome expanded and more and more land became Roman and subject to the *ius civile*, that land became automatically *res Mancipi*. When ultimately it was settled that only *solum italicum* could be owned at civil law, *solum italicum* was thenceforth the only land to be *res Mancipi*.

Other distinctions existed in special branches of the law. Thus the *res mobilis-immobilis* classification was important in the laws of prescription, theft, *dos, tutela*, possession and even procedure. *Res fungibiles*, i.e. things that would generally be counted or measured such as money, wine and grain, had

importance in the law of contracts, and closely allied to them were objects consumed in use, a class of things important also in the law of usufruct.

Finally, there was a sharp distinction until Justinian between Italic and provincial land. Italic land was all land in Italy south of the Po as well as some privileged areas outside Italy. Provincial land was vested perpetually in the people and under the Empire, in imperial as opposed to senatorial provinces, in Caesar, and whilst such land could virtually be privately owned the holders had to pay taxes and in legal theory were tenants rather than *domini*.

II

Ownership and Possession

(A) Ownership

Ownership is an idea that seems to be natural in social man and one that law will recognise and protect. It is a relationship between a person and a thing — the relationship that is expressed in terms of 'mine' and 'yours' ('*meum*' and '*tuum*'). In an early community what a man captures or land that he clears and cultivates will be accepted as his, and until society grows more complex he has more to fear from naked aggression than from mistakes or secret takings. When it does become more complex, the law has to lay down criteria for recognising ownership and protecting it. For recognition the law will insist upon some ground (or title, as lawyers would say) for ascribing ownership to the claimant — *e.g.* capture, transfer on sale, gift, inheritance. As will be seen, however, the law will always tend to presume ownership in the person who is in actual control of the property, and so ownership will usually come into question before the law in claims of property which another possesses.

However, the law not only recognises and protects ownership by giving remedies to the owner for dispossession or invasion or damage; it also recognises various ways in which an owner may use his property, usually allowing or even assisting him, but sometimes forbidding him. As a rule the advantages

and rights of ownership are prominent and greatly outweigh any duties or liabilities, though there is nothing really alien in these latter ideas to the concept of ownership. Onerous property is conceivable in any system, it is merely that most systems lean in favour of freedom and thus enhance the idea of ownership.

Roman law was certainly a system whereunder ownership was enhanced. Restrictions on the freedom of the owner were few, and duties in respect of his property even fewer, especially in private law. Most restrictions were imposed by the owner himself or some predecessor of his, very few by the law itself.

The ownership that the Roman law recognised was called *dominium* in classical law. It was the relation of a *dominus*, or originally an (*h*)*erus*, to a *res* just as *potestas* was the relation of one man to another. It was a relation, not a right or even a bundle of rights. It gave rise to rights, but they were merely incidents, albeit very important incidents. Thus a classical jurist would not talk of conveying ownership (*dominium transferre*), but of conveying the thing itself (*rem transferre*). When he transferred the thing, his own ownership of course ceased, but a new ownership was created in the transferee. He became *dominus* rather than received *dominium*.

Dominium therefore was the ownership that Roman law protected, and the questions 'who can be *dominus*?' and 'of what?' and 'when?' were answered very early, when only the *ius civile* existed. The first question was answered simply: only the citizen or the specially privileged Latin or peregrine, *i.e.* one with *commercium*, could own; and that answer remained with Roman law to the end, even though other peregrines later found protection. The second question probably had a restricted answer at first: thus land may have been incapable of ownership, except possibly for the homestead. Eventually all movables could be owned by a suitable *dominus* and, as has been seen, all *solum italicum*. The third question received the response that the *res* had to be come by in a manner that was appropriate to it. This in particular meant that *res Mancipi* could only be acquired, at least derivatively, by the special ceremony of *mancipatio* or *cessio in iure*: if an informal transfer were made, the law would recognise no change in ownership.

If the person, the property and the mode of acquisition were apt, then there existed *dominium ex iure civili* or *ex iure Quiritium* as it was frequently termed. This *dominium* was protected by the major proprietary remedy in Roman law, the *vindicatio*, and it was capable of being passed by will or on intestacy according to civil law rules of succession. In historical times it carried with it the right to use and enjoy, to misuse, to abuse and even to destroy, to bequeath and to alienate. It is true there were limits. Thus under the Twelve Tables houses were not to be pulled down, and, as Roman law developed, killing and maltreatment of slaves came to be forbidden. Local regulations might also affect the way one built on land. Moreover, by ancient law the land on the boundary of farms to the extent of two and a half feet each way (*i.e.* a whole pace) had to be left uncultivated and unbuilt upon; nor could it be usucaped. Reasonable rules in respect of overhanging branches and collecting fallen fruit also show that ownership was by no means absolute.

Much more important, however, were the limitations created by owners themselves. Many were, of course, purely contractual and could not be called incumbrances: their remedies sounded only in damages, and the obligation was personal and not against assignees of the property. However, definite incumbrances did exist. The most prominent of these *iura in re aliena* were the various servitudes, especially in the case of land. In particular, usufruct while it lasted could render ownership very bare. As time went on, various contractual rights ripened into incumbrances by virtue of their acquiring possessory and real remedies, *e.g.* *emphyteusis* (the long lease) and *pignus* (pledge or mortgage). In some cases *dominium* might become devoid of all, or nearly all, substance and continue to exist only because of and as long as a formal defect in another's title: the holder *in bonis*, to be dealt with shortly, is the best example.

Dominium was essentially perpetual. It could not be divided into estates in the English fashion. Usufruct, the closest analogy to the English life interest, always savoured very much of the incumbrance, and references to it as *pars domini* cannot alter that character. *Emphyteusis* gradually emerged as a *real* as well as a contractual right, but it could never be regarded as any form of ownership. In the classical

law *dominium* could not even be a determinable interest. Resolutive conditions could only operate as obligations on the *dominus* to reconvey ; they were in the main purely contractual ; and they never operated to make the ownership revert *ipso facto*. Justinian later confused the picture in several spheres, especially when he allowed the wife a *vindicatio* to recover the *dos*. Otherwise the only fundamental exceptions to the principle of perpetuity throughout the history of the law arose in respect of conditional gifts and manumissions in wills. Such a special latitude should not be taken to upset the basic notion of *dominium*.

Freedom of alienation was little restricted, dotal immovables being the major exception. Expropriation by the State was never favoured, even in the later Empire, and no general powers of compulsory purchase ever seem to have been given : it always required legislation. The forced sale of a slave and compulsory manumissions were thus special cases.

Ownership of land apparently extended infinitely upwards and downwards, but problems of mines and air space did not arise with the frequency and complexity that they do today. *Dominium* could not be severed laterally. The nearest the Romans came to such an idea was with the interest of *superficies*, which was a long lease of a building and juristically very similar to *emphyteusis*.

All in all, Roman law had a most liberal attitude towards ownership. It would not hesitate to impose limitations in the clear public interest, but it would generally lean towards leaving the *dominus* as free as possible. The absolute nature of *dominium* also meant that the idea of family settlements and the consequent tying up of land and other property never existed. The usufruct was the only means of making any provision of such a kind.

(B) Interests less than *Dominium*

If any of the three requisites for *dominium* were lacking, the civil law gave no protection to the claims of the holder. Thus, if the holder had not *commercium* or if the *res* was *solum provinciale* or if the *res* was come by in a way unhallowed by the civil law, then there could be no remedy at civil law. However, magisterial law gradually made good these failings and

ultimately the interests of such holders approximated very nearly to *dominium*.

1. Peregrine Ownership

The absence of *commercium* in the normal peregrine resulted in his not being able to use the formal modes of transfer or to sue out the *vindicatio* with its assertion of ownership *ex iure Quiritium*. *Usucapio* also would apparently be denied him. When he was in his own territory, he would receive adequate protection, no doubt, from his own civic law. Under the Republic, treaties between his State and Rome might well make provision for his protection in Rome, and after the institution of the peregrine praetor he would probably receive a general protection in that jurisdiction. When he did sue in Rome for his property by means of a proprietary remedy and not by a possessory interdict, the praetor probably gave him an adapted *vindicatio*. The *formula* would probably not contain the fiction '*si civis Romanus esset*', which was the normal way of enabling a peregrine to sue, because that clause would be most inelegant in Roman ears alongside the *ex iure Quiritium* in the body of the *intentio* (and to delete the latter words would really make the fiction unnecessary). The other suggestion of an *intentio* containing the variant '*habere frui possidere licere*' instead of an assertion of ownership is much the more probable. As time went on and citizenship was more generously bestowed, and particularly after the *Constitutio Antoniniana* of A.D. 212, peregrines in Rome itself would become fewer and fewer, and by Justinian's time questions as to their property would be rare.

Although they were free to use and benefit by all *iure naturali* modes of acquisition and although a Roman would naturally ascribe the protection of their property to the *ius gentium*, it is probably safer not to talk of *iure gentium* ownership. The interest of peregrines (which Gaius can even term '*dominium*') cannot be equated with any interest of citizens, for this depended on very different remedies.

Peregrine ownership raises many problems in respect of assignments of property (particularly *res mancipi* such as slaves and horses) to citizens. *Traditio* alone could be used because of the lack of *commercium*. Was the Roman's title defective and curable only by *usucapio*? Had he to resort to *actio*

Publiciana (post, p. 163) instead of *vindicatio* if he wished to sue within the year? The problem is insoluble on our present knowledge, as also with the opposite case of the assignment by a *civis* to a peregrine. If the Romans did relax the civil law here, the presence of a convenient peregrine to take and to make a token *traditio* could evade the need for *mancipatio* of a *res Mancipi* between citizens.

2. Interests in Provincial Land

Under the Republic, *ager publicus* was often occupied by mere licensees of the State. Their tenure was far from secure in theory, though in fact it might last for generations, and it depended primarily on public law and thus did not concern private law and the praetor. When Rome made conquests outside Italy, provincial land (unless covered by the *ius italicum*) became the property of the people and hence those in possession of it could have no ownership. At first, no doubt, they were little better off than the occupiers of *ager publicus*, but gradually the provincial magistrates gave proprietary remedies — probably the *vindicatio* with the '*habere frui possidere licere*' variation. Their interest was assignable by *traditio* and, as will be seen, a mode of prescription was gradually evolved because *usucapio* could not apply.

3. Bonitary Ownership

This is in origin a Byzantine phrase, used to denominate an interest that evolved from the grant of remedies by the praetor to holders of property in certain cases. The original Latin phraseology was '*habere in bonis*' (with the holder as subject) and '*in bonis alicuius esse*' (with the *res* as subject). The name 'praetorian ownership' is also given to it and is just as suitable, but it is clear that the Romans never looked upon it as ownership in the sense of *dominium*. Gaius does come near to calling it *dominium* on two occasions, but in each case the word is used compendiously with Quiritary title and his terminology is elsewhere strictly in accord with the otherwise universal usage. Even so, the effectiveness of the praetorian remedies was such that the holder *in bonis* was little worse off than an actual *dominus*. Only in the case of the manumission of a slave did the defect in title have serious disadvantages.

The classic holder *in bonis* was the man who received a *res Mancipi* by *traditio* instead of by *mancipatio* or *cessio in iure*. At civil law he had no right in the *res* till the period of *usucapio* was up. The praetor, however, not only gave him the possessory remedies of the interdict — effective and usual though they were — but also fashioned a proprietary remedy for him out of the *vindicatio*. There seems no reason to suppose that this remedy was not the famous *actio Publiciana*, although Gaius only cites the *formula* in respect of the *bonae fidei possessor in via usucapiendi*. Indeed it may well be that the *actio* originated in the case of the holder *in bonis* and was later extended, especially since the ordinary *bona fide* possessor would normally think he was owner and sue out the pure *vindicatio*.

The protection of the 'bonitary owner' was twofold, depending on whether he was a defendant in possession or a plaintiff seeking a return of his property. In the former case he had to fear only the *vindicatio* of the Quiritary owner. To meet this claim the praetor inserted in the *formula* an *exceptio*. The original *exceptio* was probably *rei venditae et traditae* and it applied only where the delivery was on sale, which had probably been the commonest case. However, *exceptiones* were no doubt granted where *traditio* had occurred on a different transaction — e.g. *rei donatae et traditae* on gift.

The second case would give rise to the *actio Publiciana*. Here the *formula* was basically that of the *vindicatio*, but there was inserted a fiction that the period appropriate for *usucapio* of the *res* (either one or two years) had run. The fiction was, of course, not traversable. The plaintiff would have to prove all the requisites for *usucapio* other than the lapse of time. In the case of the holder *in bonis* this would not be difficult, although it might well be so in the case of other *bona fide* possessors. A Quiritary owner could always repel an *actio Publiciana* by the ordinary *bona fide* possessor by insertion of the *exceptio iusti domini*, claiming his civil law title. Unless the holder *in bonis* had a variant of the *formula* he too could be met by that *exceptio*, and so he might have to answer it with a *replicatio* (e.g. *rei venditae et traditae*).

In post-classical times bonitary and Quiritary ownership became more and more assimilated, and *traditio* seems to have been general for all movables, *res Mancipi* included. Probably the rise of the *cognitio extraordinaria* and the death of the

formular system had swept away the importance of the procedural distinctions, which were by then the only major ones. Justinian's final (almost formal) abolition of the distinction between *res Mancipi* and *nec Mancipi* resulted in the elimination of the holder *in bonis* from his statements of the law. However, many texts to do with *bona fide* possessors are almost certainly the result of the compilers' adapting passages concerning the holder *in bonis*.

Although the man who receives a *res Mancipi* by *traditio* is the prime case of a holder *in bonis* that Gaius gives us, he also includes in the term other cases of persons holding a *res* without a *iure civili* title but by virtue of the praetor's authority. Thus the *bonorum possessor*, who looms so large in the law of succession, and the *bonorum emptor* in the field of bankruptcy and execution hold the *res* under the praetor's order and are in process of usucapting. Their remedies may not have been the same, but they constituted similar adaptations of the *vindicatio* and there no doubt existed appropriate *exceptiones*. Several other cases of praetorian ownership existed, e.g. the holder under a *missio in possessionem* for *damnum infectum*. Their interests had in common not only dependence on the praetor's authority, but also a temporary nature to be ended by the operation of *usucapio*.

(C) Possession

Basically possession is a factual situation involving a human person and an object: where a man is controlling or directly able to control that object he possesses it. It is this possession that is the major advantage of ownership. The owner may either keep the possession for himself and thus obtain direct physical enjoyment of the thing or he may delegate it to some other for him to enjoy, whether the motive for delegation is hire or security or safe-keeping or merely liberality. Possession in this original sense can refer only to a physical object: the notion of intangibles as things comes later in the development of law and in any case the term 'possession' is only, if at all, applied to them in an extended, almost metaphorical, sense.

The element of control, actual or potential, is then at the back of the idea of possession, and lawyers in all their extensions and refinements on it never really abandon that element.

But control is a loose idea, and each set of circumstances will tend to produce its own difficulties, so that common sense and convenience will tend to play more part in the treatment of possession than can *a priori* reasoning. Useful general rules will arise, but they will not dominate and exceptions are not to cause surprise. A few examples. My dog is in my possession whether I carry him in my arms, walk him on a leash, or just let him trot along with me; I will possess him when he is asleep in his kennel, when he runs in my garden, when he goes off down the road on his own. Indeed he will be in my possession, it seems, until he either becomes a stray or is taken by someone else. Again, my coat is possessed by me when I wear it, when I leave it in my wardrobe at home and when I have left it hanging on a peg in my club. As a general rule, then, possession once got will be retained till abandonment or till dispossession by another. Possession will be retained, in fact, even though I forget that I have the coat or cannot even remember where it is.

Whether possession exists will also often depend on the thing in question. Control of an inanimate object will normally be less complex than that of an animal or, even more so, of a slave. Land too will have special considerations: the possessor may go far away and be long absent, yet he will still possess it, and, moreover, he will possess the movables he leaves upon it.

In any system of law where ownership is recognised and protected, sooner or later possession will assume a great importance and will itself receive legal protection. There are various reasons why this should be. In the first place property is always a cause of strife. The law of theft will counter the more blatant interferences with it, but every legal system has to face the problem of the indignant claimant of property and to meet the dangers of unrestricted self-help. Especially in the case of land in an agricultural community the forcible taking of possession is to be severely discouraged. Besides any criminal sanctions for such action, the most effective deterrent the law can wield is to eject the dispossessor more or less summarily. If the dispossessor is really entitled he can always resort to his proprietary remedy. This may work hardship on the true owner in some cases. Deprived of his earliest remedy, self-help, he has to prove his right to the property, and frequently this will be a difficult, sometimes an impossible, task.

But no law can let such a risk oust a solution that will prevent violence and retaliation and the possible endangering of the good use of the property for a considerable time.

The first main reason for protecting possession — the 'police' reason, it has fairly been called — is linked to, rather than contrasted with, the second that is alleged. Most possessors are in fact owners : to protect their possession is to protect ownership. If proprietary remedies are cumbersome, slow and hazardous to the plaintiff, then a more summary, effective possessory remedy will be in the clear interests of society and the law. This line of argument may be criticised, but it seems that most legal systems, and societies generally, are prepared to follow it. The possessor is, therefore, presumptive owner, and this presumption is likely to be no more unfair than any other. Viewed in this way, the remedies would seem merely preliminaries to a proprietary remedy, their effect being to designate the plaintiff and the defendant. However, very often the possessory remedy will be final, particularly if the dispossessor is a wrongdoer or if the legal system allows the dispossessor to escape ejection by pleading that the dispossessed had previously gained possession in some tainted fashion. This latter development in the remedy can itself lead to a revolutionary change : the parties in the possessory action are each allowed to show reasons that he has a better right to possess than the other. Once this occurs a new idea is born — the idea of title. This is a concept of right, but it differs from ownership in that it traces back from present possession to events that establish the better right of the party in question. It is a useful concept, almost essential when society becomes complex and absolute ownership becomes almost impossible to prove. It may even be looked upon as relative ownership, and often the term 'ownership' becomes more frequently used in this sense. Such a portentous development occurred in respect of land in English law with the progressive extension of the possessory assizes through the writs of entry in the thirteenth century, and later in respect of chattels with the writ of trover. The development went so far that even violent dispossession of land, though criminally punishable, is not invalid or civilly remediable if the dispossessor has title.

Although the early history of the protection of possession in Rome is most uncertain and much disputed, its development

follows the general pattern in the main down to the stage where tainted (or *vitiosa*) *possessio* can be pleaded by the dispossessor. There was, however, never any progress therefrom to a concept of title. The reason for this would seem to lie in the early institution of *usucapio*, either created or confirmed and regulated by the Twelve Tables. The two features of that institution that were vital for this discussion were (a) the short duration needed for prescription (one year for movables, two for land) and (b) the acquisitive nature of the prescription (*i.e.* its ability to confer *dominium*, not just to extinguish that of the former *dominus*). These features kept the idea of absolute ownership still practical and thus eliminated the need for a separate notion of title (although 'title' in a more restricted sense did become of crucial importance in *usucapio* itself, as will be seen).

Usucapio is also the first manifestation of the importance of *possessio* in Roman law. *Usus* is in essence just possession. So the Romans developed very early the principle that a period of possession — and comparatively a very short period — should confer ownership on the possessor. The shortness of term may be attributed to intolerance of the laggard owner and to a desire to see property usefully employed, especially in the case of land.

It was later in the Republic, perhaps in the second century B.C., that possessory remedies in the form of interdicts were established by the praetor. Although they were all rather complicated and later became almost cumbersome, they were much speedier and more effective than the proprietary remedy, the *vindicatio*. They depended more on the executive 'police' powers of the praetor than on his judicial position. There is great controversy as to the origin of these interdicts. Some hold that they were given to protect the '*possessores*' of *ager publicus* during the Republic, there being no proprietary remedy for such State tenants. Ihering attacked this theory mainly on the ground that their protection would have been afforded by the public law rather than by the praetor's jurisdiction and that general extension would have been unlikely. He propounded the view that the interdicts started as mere ancillaries to *vindicatio*, settling more efficiently the preliminary issue of interim possession than the old procedure had done. Two of the interdicts at least, *uti possidetis* and *utrubi*, could

well have arisen so. Others, especially *unde vi*, look more like police measures, instituted by the praetor during troubled times just as the delict of *rapina* was later. All one can say is that it would be foolish to dismiss any of the theories on the evidence there is and safer to think that the various reasons may all have contributed in the early growth of the remedies.

By the classical period, if not long before, *possessio* had come to be thought of primarily as that relationship of man to *res* that is protected by the interdicts. This would normally be the same as that which gave rise to *usucapio*, but in at least two important cases the benefits of *usucapio* and of the interdicts were separated. These were in pledge (*pignus*), where the creditor had the interdicts, but the debtor could still *usucapere* against the former owner, and 'bailment at will' (*precarium*), where it seems the 'bailee' had the remedies whilst his 'bailor' was the possessor for *usucapio*. (He did, however, have one possessory interdict, *de precario*, against the bailee when he wished to terminate the bailment, but none against third party ejections.) *Usucapio* possession was often termed *possessio civilis*, in post-classical times at least.

Now who had this protected *possessio*? Firstly, any person who was in control of the *res* and was either owner or acting as owner. To act as owner one might be either *bona fide* or *mala fide*, even a thief. The fact that for some reason *usucapio* could not operate made no difference — one merely possessed without dependence on another's interest. Naturally also, those were possessors who held the *res* by virtue of the praetor's orders or protection.

Then there were a series of dependent or derivative possessors: holders who had an interest in the *res* that the praetor was prepared to safeguard. In general, the dependent holder can be said not to have merited the interdicts in the eyes of the praetor. The *possessio* and its protective remedies were still vested in the real or apparent owner. This, of course, meant a severing of *possessio* from its basic notion of control or occupation. Various terms are used to describe this control without *possessio*: the most common, though perhaps not classical in origin, are *detentio* and *possessio naturalis*. It is much the same as the English conception of 'custody', 'detention' or 'possession in fact' where a servant holds, but is

not in possession of, a chattel for the purposes of larceny from his master.

Amongst those who had this *detentio*, but not *possessio*, were (i) the hirer (*conductor rei*); (ii) the man who does work on another's *res* for payment (*conductor operis*); (iii) the normal bailee for safe keeping under *depositum*; (iv) the gratuitous bailee of *res* for a definite purpose or length of time (under *commodatum*). Perhaps, most surprising of all, is (v) the usufructuary (and the usuary) because he did not have just a contractual right, but a definite *ius in re aliena*. Even so, when the interdicts were being fashioned during the Republic his interest was not regarded as one to be awarded the interdictal protection. Whether this was because the usufruct was classed as a *res incorporalis* and was itself incapable of *possessio* would seem doubtful in that it would involve a confusion between the usufruct and the *res*. Possibly the reason was rather that at the period in point usufruct was an interest that could only be created by will and therefore almost invariably would be for family arrangement. If so, it might be considered inappropriate to give a police remedy against a *dominus* related to the usufructuary and appropriate to rely upon that *dominus* to look after the interests of all concerned. Later the usufruct, while still created most often by legacy, became extended, sometimes being a commercial interest and in several important cases arising by operation of law. When this occurred the need was felt for a possessory as well as the proprietary remedy. An interdict (*quem usum fructum*) was specially created, and the usufructuary was treated as having *quasi possessio* (probably a post-classical term).

Of the derivative holders who were accorded *possessio* the most important were: (i) the pledge creditor under *pignus*; (ii) the *sequester* under a *depositum sequestre*; (iii) the *precario tenens*; (iv) the *emphyteuta* and *superficiarius*.

The pledgee is a clear case. He seems never to have been regarded as having a *ius in re* and his only protection was his *possessio* and the interdicts. Yet he was of an importance in society that the praetor could not ignore. A creditor would have been much worthier of consideration than a tenant farmer (*colonus*) or a borrower or even the debtor himself. Besides, there is little point in security at all if the debtor by managing to retake control can leave his creditor with merely contractual

remedies ; and if the debtor is in difficulties and has little to gain by paying off the debt and recovering the pledge, a pledgee who loses control to a third party may find the debtor most unenthusiastic in his efforts to recover it. So the important status of creditors, the need for encouraging free giving of credit in an expanding community and the special circumstances of the interest would all influence the praetor.

The *sequester* was a stakeholder whose function was to keep a *res* whilst two conflicting claimants to it were settling their dispute. It seems that the major reason for according *possessio* to him, as was normally, though perhaps not invariably, done, was to prevent either claimant from usucaping. However, the convenience of giving him the interdicts to prevent a disputant from anticipating the result of a lawsuit is obvious.

The *precario tenens* is the most puzzling case. For one thing it is very uncertain quite what *precarium* involved and how it was distinguished from *commodatum*, where only *detentio* was given. Although *precarium* was more normally a 'bailment' of land and *commodatum* one of movables, both could quite regularly be of either. The latter, however, was probably only for a definite purpose or for a specified length of time, whereas *precarium* may have been an arrangement that could go on indefinitely. It could be that in cases of *precarium* the *dominus* was absent from the *res* (especially land) for a longish time and at a considerable distance and was not able to respond to the tenant's appeal to him to sue out an interdict (this would be improbable in *commodatum*). To give *possessio* then to the tenant would be in the interest of the *dominus*, not an infringement of his *dominium*. Another interesting suggestion is that *precarium* was a very limited arrangement in classical law, when *possessio* was given under it, and applied only in cases such as where a creditor under a *fiducia* or a seller allowed the debtor or purchaser into possession at will. This would again explain the conferment of *possessio*.

The *emphyteuta* and *superficiarius* apparently came on the private law scene late in the day. Their interests probably began as arrangements by the State for renting out certain public land (*ager vectigalis*) and building sites. The fact that the State would be the least likely landlord to want to eject a tenant except for non-payment of rent would explain their being regarded in time as perpetual or long-term interests.

As such interests they would in post-classical times be adopted by private landlords in cases where leases more permanent and more respectable than *locatio* to a *colonus* were appropriate. The interdicts that were granted arose when they were State leases and there was no reason why the grant should not be made when they could be private leases as well.

From all this it can be seen that it is impossible to find a general principle that would readily explain the incidence of *possessio* in derivative holders. Roman law, here as elsewhere, is predominantly empirical and the factors that decide will vary greatly in each case. However, the presence in the texts of considerable discussion of the acquisition, retention and loss of *possessio* has encouraged modern attempts to define *possessio* in a way that should cover the known cases. Such attempts are hardly satisfactory and the discussions themselves are mainly unsystematic, and several times contradictory of each other: endeavours to theorise alongside practical treatments tend to great confusion.

The starting-point of much controversy has been the famous statement of Paul that possession is acquired *corpore et animo*. This means that there must be both a physical act or state of affairs and a mental condition. The physical element will normally be a taking of control, but it could be a keeping of control, and in any case it was always viewed from the angle of common sense, convenience and desirability of conferring an interdict. This was especially so in respect of land: the purchaser of land got possession of all of it merely by entry (which itself might be constructive when *longa manu*) without the necessity of patrolling the boundary, but an invading army was only in possession of what it actually occupied and any dispossessor of land was not considered (by some jurists at least) as in *possessio* until the dispossessed knew of the intrusion and failed immediately to eject him. One cannot then hope to discover any very definite principle in respect of the *corpus* in *possessio*.

The element of *animus* has, however, been selected as the major criterion of *possessio*. Savigny propounded the view that the *animus domini* (or *animus sibi habendi*) was the mental element required by Roman law: the intent to deal with the *res* as one's own. This explained well why the lessee and borrower, usufructuary and depositor had *detentio*: it failed

completely to explain why pledgee and *sequester*, *precario tenens* and *emphyteuta* had the interdicts. Theories of derivative holders and subtle qualifications on the *animus* have not achieved for the theory total conformity with the facts of Roman law. There seems little harm in treating the awkward instances as exceptional cases dictated by policy, especially if Savigny's view that the interdicts were conferred primarily for 'police' reasons is correct. However, Ihering refused to accept the *animus sibi habendi* in any form as the basis for possession. He regarded the *animus* as just the consciousness of possessing and treated the *corpus* as the essence of the matter. If the would-be possessor was in relation to the *res* as the owner normally would be, then he was indeed in *possessio*. *Possessio* was thus the appearance of ownership. Unfortunately, whilst the anomalies in Savigny's view are well-housed by Ihering's, those derivative holders with mere *detentio* are exceptions here. Not that this is fatal to Ihering's theory, which is allied to his view that the interdicts were instituted to protect ownership: those with *detentio* are so closely dependent on the *possessor* that there is no need for the remedies to be given them.

It must suffice here to say that neither view is completely convincing and that the Romans themselves hardly established any principles. Paul's '*animus*' would indeed seem to be no more than that consciousness that Ihering asserts. Thus the *furiosus*, the *infans* and the sleeping man cannot take possession, however strong their grasp on the *res*. A *pupillus* of sufficient intellect could take possession even without his tutor's *auctoritas*, it was eventually settled. Yet the *animus* had to be fairly definite: on taking possession of a *res* one did not take possession of things inside it unknown to one—at least if the things were not such as to be expected in the *res*. Presumably a possessor of land possessed the bulbs and seeds in it, whether known of or not, but he had no *possessio* of treasure or other *res* buried in it—not even, it seems, if he knew they were present somewhere in the land.

The rules relating to acquisition of *possessio* varied greatly in the course of Roman law and this was particularly so as regards acquisition of it through another. The general rule was that such an acquisition required not only a *corpus* and *animus* of that other (the *animus* being the intent to possess

for the principal), but also an *animus* on the part of the principal. This latter *animus* could be a prior authorisation, or even a general one, it seems, but otherwise it meant that *possessio* did not accrue till the moment at which it became known to the possessor. If dispossession occurred before that moment, presumably no interdict lay and the only remedy might be an *actio iniuriarum* with its very strict limits. By the classical period it was settled that *possessio* could be acquired through free persons if they had been duly made *procuratores* by *mandatum* as well as through *filiifamiliarum* and slaves. A relaxation of the rule requiring the *animus* in the principal was made by the jurists in the case of the *peculium*, a common-sense exception to the rule. After much hesitation it had also been decided that a slave held in usufruct could in appropriate circumstances achieve *possessio* for the usufructuary, although the latter had not *possessio* of him. Other relaxations, such as that a slave could acquire *possessio* for his *furiosus* or *infans* master, again show the difficulty in seeking general principles from the rules enunciated.

Possessio usually remained until an act of dispossession or abandonment. In appropriate circumstances one could retain it *animo solo* — for instance in the case of summer and winter pastures where for a season the land would be useless and derelict. In later law one could even lose it *animo solo*: this was the case of *constitutum possessorium* where an owner-possessor sold a *res*, but continued to hold it as tenant or borrower from the purchaser, ownership and possession thus passing and *detentio* alone remaining. However, this was almost certainly anomalous. Once again the rules for retention and loss were essentially practical and suited policy rather than logical conformity. Thus the continued *possessio* of a runaway slave (except where he was claiming to be a free man), the retention of *possessio* where a slave or *colonus* died in occupation of the land (and even, under Justinian, where he abandoned the land until a third party took possession or the possessor knew of the abandonment and failed himself to occupy), and the persistence of *possessio* during a temporary absence from land until an opportunity to expel a squatter had arisen on return, are all clear examples. Convenience again makes mock of theory. Yet many rules are fairly obvious. *Possessio* is lost where a movable is dropped and lost or where the owner or

even the borrower throws it away. Whilst a possessor does not cease to possess when he goes mad, the possessor who is captured and enslaved loses possession directly and does not reacquire it *ipso facto* by *postliminium*: he must reoccupy. Death also ends possession and the *heres* must actively take possession even where a *colonus* is occupying inherited land. The act may just have been a notification of the inheritance, but there was no automatic *possessio*, even though for *usucapio* and other purposes the heir's *possessio* when established was treated as an extension of the deceased's.

The importance of *possessio* is vast and various. Primarily, of course, it gave the interdicts. The present possessor could strengthen and safeguard his holding by *utrubi*, the classical remedy in respect of movables, and by *uti possidetis*, which for the classical jurists protected land but by Justinian had, in all but name, ousted *utrubi* for chattels also. The rules of these two interdicts show well the complexity of *possessio* and the incidence of empiricism in their development. In *utrubi*, in fact, the question 'Who is in possession?' was not even asked; instead, 'Who has been in possession for a greater part of the last year?' This seems a very odd substitution, for the chances of the answers being the same may not be above half. It has, however, the advantage of not encouraging continual scrapping for control of the object before suing. In *uti possidetis* the continuance of *possessio* in the temporarily absent holder even after entry by another explains the difficulty of the question 'Who is actually in possession?', particularly in respect of land. It is for these reasons that *possessio* here becomes abstract and the two interdicts have a recuperative as well as a retentive nature. As will be seen (*post*, p. 465), the *exceptio vitiosae possessionis* heightens this recuperative aspect. The purely recuperative *unde vi* (*armata* and *cotidiana*) acted to discourage the forcible ejector and indirectly to safeguard peaceful *possessio*.

Besides the interdictal protection, *possessio* was, of course, the basis of *usucapio* and other prescription. It dominated other forms of acquiring ownership too: *occupatio* was mere taking of possession, *traditio* its delivery. *Bona fide* possession gave rights in the fruits and produce of the *res* possessed. By virtue of praetorian remedies such as the *interdictum Salvianum* and *quorum bonorum* the laws of real security and of succession

were completely revolutionised, and the *missio in possessionem* was one of the most powerful weapons in the praetor's armoury.

III

Methods of Acquiring Ownership (otherwise than by Succession)

In Roman law there is a sharp distinction between the acquisition of ownership *inter vivos* and that by succession on death or by analogous successions (e.g. upon adrogation). In general, the former type of acquisition was of *singulae res* whereas succession was to a *universitas rerum*. Legacies were indeed a mode of singular acquisition, but their being treated elsewhere than in the context of universal succession is unthinkable.

Acquisition of *iura* can best be considered in their general treatment although the ancient assimilation of early *iura* with corporeal things brought about a certain overlapping in rules. Transfer of *obligationes* and allied topics are remote enough to be dealt with elsewhere.

The topic therefore is how one could become owner of a *res corporalis* in Roman law. Not a few ways existed, and they can be variously classified. The prime Roman classification is into the *iure naturali* and *iure civili* methods. The classification concerned the origin and the subjects of the acquisition rather than its effect. Both made the acquirer *dominus* if he had *commercium*. *Traditio* of a *res nec Mancipi* in developed Roman law conferred *dominium* of it as much as *Mancipatio* of a *res Mancipi* or *Cessio in iure* of any *res*. When the praetor dealt with a peregrine acquirer he could look only at the *iure naturali* modes for founding a claim to protection, while at civil law *res Mancipi* could be transferred only by the civil methods, *traditio* of them having no effect at all. However, apart from these cases the classification seems to have little value. There has been much discussion on the origins of the various modes and which type was the earlier. Suffice it to say that of the natural law methods *occupatio* must have antedated all other methods, while *accessio* and its like arose much later mainly under the influence of juristic thought.

Traditio must have been extremely early also; whether the civil *mancipatio* predated it in Rome for the purpose of a legally protected ownership is apparently insoluble and depends on the whole question of the origins of private ownership. Be that as it may, all the main *iure civili* methods (i.e. *mancipatio*, *cessio in iure*, *usucapio*) are very old, going back to the Twelve Tables and before.

A more useful division is into (i) original, (ii) derivative and (iii) prescriptive modes. The first class consists of cases where ownership is acquired in complete independence of any prior ownership; the second covers the most important field, that of conveyancing; the third has affinities to each of the others but is sufficiently distinct to be treated separately.

It is as well to mention that there are certain minor modes of acquisition, mostly with some public element, that are best dealt with very summarily apart from the rest. They included: (i) *adiudicatio*, whereunder a *iudex* in one of the partition actions (*familiae erciscundae* for an *hereditas*, *communi dividundo* for partnership property, and *finium regundorum* for disputed boundaries of land) allotted ownership to an individual who had previously either owned only in common or not at all; (ii) *litis aestimatio*, whereby ownership passed to a defendant who elected to keep the *res* claimed and pay damages instead; (iii) *lex*, a residuary category covering several odd cases based on statute and occurring mainly in the law of succession, e.g. where a gift fails under the *leges caducariae* (the classification is unsound — it might as well include *usucapio* with its root in the Twelve Tables); (iv) *ius accrescendi* in the special case in classical law where a co-owner manumitted a slave formally and independently of his co-owners, with the result that the other or others acquired his share automatically.

(A) Original Acquisition

1. *Occupatio*

Occupatio is taking effective possession, with intent to become owner, of something which at the moment belongs to nobody. It would be of great importance in the earliest times, but in the developed law it had limited scope. The chief cases are —

(a) The capture of wild animals. Here the animal must be actually captured; it is not enough to wound it, but per-

haps killing it or having it fast in a trap will give ownership in priority to one who first lays hands on it. If it escapes it becomes *res nullius* once more. The animal must be wild by nature, but this includes deer, peacocks, pigeons and bees, as well as lions, bears and wolves. Wild animals captured and tamed remain owned even when released so long as they have the *animus revertendi*, the habit of returning. Bees are owned when hived, and upon swarming they cease to be owned only when they disappear from the owner's sight or otherwise can no longer be easily contained. Domestic animals remain owned even if they stray and are lost; presumably also, even if they become wild.

(b) Enemy property. This referred to property captured on Roman soil and belonging to an enemy country or its nationals. Originally, any foreigner not protected by treaty or other friendly arrangement with Rome was fair game as to person and property, and the first taker was owner. The rules did not apply to the spoils of war, which belonged to the State and might be auctioned by the general, and there were probably other public law restrictions on this *occupatio*.

(c) *Insula nata*. If an island is formed in the sea (but not if formed in a river) it is considered *res nullius* and belongs to the first occupant. The rule would be important in tropical and volcanic areas. It extended to anything unowned extracted from the sea or washed up by it.

(d) *Res derelictae*. This is the most difficult case and there is much controversy and little authority. If the *res* was merely washed overboard or jettisoned temporarily then *occupatio* was not possible, and unless the taker was *bona fide* he would be liable for *furtum*. The former owner had to form a definite intention of abandonment, but it was recognised that he could so intend in respect of property he had lost. There is something strongly bilateral about the rules and *occupatio* comes very close here to *traditio incertae personae*. The Proculians even held that ownership did not cease till possession had been taken by another, but the Sabinian view that it ended with the abandoning prevailed. The major difficulty arises in respect of abandoned *res Mancipi*. There are no texts, probably because it so very rarely happened. It is argued that *occupatio* did not give full ownership of such *res* because it is only a *iure naturali* method: the taker had to wait for the period of

usucapio to elapse before he became *dominus*. However, there seem to be misconceptions here. Firstly, a *iure naturali* method does not create a *iure gentium* ownership — there is no such thing — though it may create a bonitary one; secondly, what applies to derivative acquisition (*traditio*) need not apply to original; and thirdly, *res Mancipi* could be acquired fully by *iure naturali* methods. There is no doubt that *avulsio* and *alluvio* gave *dominium* of Italic land directly, and, on the Sabinian view that beasts became *res Mancipi* at birth, *dominium* of such a beast might be acquired by *fructuum separatio* or *perceptio*. Presumably also one became *dominus* by *occupatio* on capturing an enemy or his slave. The stronger argument would seem to be that abandonment and occupation could be used to evade the necessity for *Mancipatio* to transfer *dominium* directly. This is open to argument also. The intention to abandon is something very different from that of leaving to be collected: the line between *derelictio* and *traditio* is clearly crossed. The two instances would almost invariably be distinguishable by a *iudex*: where they were not, the abandoner would be running a serious risk of another's 'occupying' first. To exclude *dominium* in a genuine *occupatio* of a *res Mancipi* would cause all sorts of further difficulties. Did the *occupans* hold *in bonis*? It is generally admitted by the protagonists of this view that he did. But what *exceptio* did he have? That *rei donatae et traditae* is too unlikely, and one *rei derelictae et occupatae* more than improbable.

Although the jurists delighted in speculative, even unreal, problems of ownership, they do not tackle these on *derelictio*. It must be because the abandonment of things that the abandoner might wish to reclaim was simply too rare. It was for this reason also that a genuine mistaking of a loss for an abandoning was equally rare and few takers of lost things were *bona fide* and innocent of theft.

2. *Accessio*

Accessio is the process whereby one thing becomes attached to and inseparable from another. There are many different instances, rules and complications, and many decisions are purely on their own facts. However, some general principles may be tentatively stated and a general approach adopted. The first point is whether the attachment was effected with the

consent of the owners in question : if it was, then ownership would follow the intent and normally be common. If not, the second question was whether the objects were feasibly and legally separable. The feasibility might depend on the difficulty of the operation itself, in the danger to the object or objects involved, or on the comparative cost of the operation and the objects. Legal inseparability arose by virtue of the rule of the Twelve Tables that a house must not be demolished nor any part of it dismantled. If the objects were separable, then ownership remained as before the joining, and separation might be sued for. If they were inseparable, the question arose which was principal and which accessory. The owner of the former would then acquire the latter automatically.

It should also be noted that the identity of the attacher (*i.e.* owner of the principal, owner of the accessory, or non-owner) and his state of mind (*bona* or *mala fides*) are alike irrelevant to the question of ownership, though they may well affect questions of compensation and the availability of remedies. The whole field is a mass of not always very subtle philosophising complicated by considerations of convenience. Nor are the rules always clear, and it is often dangerous to apply a solution given to a converse case, let alone a parallel one.

(a) *Accessio* where land is the principal. Various cases arise :

(i) *Alluvio* occurs where earth is gradually and imperceptibly added to land by the flow of a river (or by winds ?). Naturally no question of compensation could arise because the losing owner would be undiscoverable.

(ii) *Avulsio* involves the detachment from a bank by a river of a substantial and identifiable piece of land and its deposit against the land of a lower riparian owner. Here there is no loss of ownership until the annexation becomes permanent by the rooting of trees (or other incorporation by vegetation ?). No mention is made of compensation, probably because there has been no act of any party : it is a feat of nature.

(iii) *Alveus derelictus* and *insula nata* in respect of a river cause difficulties in lands where streams dry up frequently and often change their course. The bed that is left may be most desirable for agriculture. Despite much discussion whether the bed of a river is *res publica* like the stream itself, the basic

rule seems to be that the bed belongs to the riparian owners up to the middle line. Thus if an island is formed in the river its ownership will depend purely upon *that* middle line: if it is all on one side of the line it belongs solely to the nearside owner; if it is not all to one side then the middle line of the *stream* will be drawn through it and that will apportion ownership, not any middle line of the island itself. If, however, part of a man's land is made into an island by a dividing of the stream, this is clearly a different case from that of a new island and there is no change at all in ownership.

Changes in the course of rivers cause many difficult problems. The abandoned bed is divided between the riparian owners (or, of course, acquired entirely by one who owns both sides). The new course will be quite indiscriminate of owners of land. If it is a large river, a whole plot may be submerged and an owner left with no land, and even if not, it is almost certain that where more than one owner is affected the middle line of the new stream will not run along the pre-existing boundary line. Now the Roman rule is clear this far: once the new river is established in its flow the old rights in the soil covered disappear, and the general rule of division of the bed by the riparian owners if the river dries up or moves again applies. The case of the man who lost all his land in this way troubled the Romans (or at least Justinian), and some mitigation is suggested without any clue as to what it may be. Any such mitigation still leaves the majority of cases saddled with the probability of extreme hardship. Where the river chooses to cover, *e.g.*, nine times as much of *X*'s land as of *Y*'s and later moves away, *X* is likely to lose some four-ninths of his former land to *Y*. Nor does there seem to be any ground for compensation. One is tempted to treat the statements of law as arising from the posers of students rather than from actual events except that the phenomena must have been not uncommon in many parts of the Empire. The rule that may alleviate the hardship in many cases is that mere flooding does not alter the pre-existing rights. If one can include in *inundatio* all cases of seasonal changes in course, the law is more sensible: the less temporary changes would then work not unlike legal prescription and prevent the resurrection of old claims. But it is far from clear that *inundatio* could be so regarded, and the whole state of the law as we know it is very unsatisfactory.

(iv) *Plantatio* and *satio*. It is common sense that what grows on land as a result of natural processes (*e.g.* seed carried by wind or birds) should go with the land, not unlike *alluvio*. It is undeniable too that what a man plants or sows of his own in his land continues to be his as it grows and changes. The questions arise where cultivation of land is effected with plants or seeds not the owner's. Much here depends on the feasibility of separation, and it is true — and was in Roman days — that at certain seasons many trees, shrubs and flowers, whether grown from seed or planted, can be easily and safely transplanted. However, the rule was that once a plant took root in the soil and once the seed was in the ground they acceded to the land and became irrevocably the landowner's property. However soon or often he moved them (*e.g.* with bulbs) they were his. The only reason given by the texts is that the plant may have been drastically affected by the new soil — a reason in no way convincing. Perhaps two others will be better. Firstly, a rule that might countenance separation would be most inconvenient because the separation is only periodically possible and so a landowner might have to see his land taken up by another's trees or crops and useless to himself for months. Secondly, in the case of seed especially, the work of cultivation and money spent on the land far exceed the worth of the other man's property. Much better then to let the other man secure compensation than to give him ownership.

Compensation is a most important question here, especially amongst farmers. Involved is not only the original plant or seed but also the work of cultivating. Two very different cases arise. Firstly, *A* sows his own seed (or plants his own tree) in *B*'s land, and secondly *C* sows *D*'s seed in *C*'s land. (The case where *X*'s acorn falls from his tree on to *Y*'s land and becomes a tree involves no human act and there is no example in the whole law of *accessio* where compensation is obtainable otherwise.) In the former example, *A* will normally be possessor of the land. If he is *mala fide* then the law gives him no help: it is as if he has made a gift because he knows the land is another's. If he is *bona fide* his prime remedy is to resist *B*'s *vindicatio* with an *exceptio doli* whereby *B* will recover the land only if he reimburses *A* for the value of the plants at the time of the action. This was the first, and for long

the only, protection for *A*. Perhaps after the classical period (or late in it) the law gave him an *actio in factum* if he lost possession and thus the *exceptio*. However, there is no evidence of such an action, and it would be an extension of the *exceptio* on a principle of unjust enrichment rather than the normal compensation action for an act of *accessio* by another.

Where the seed was *D*'s and *C*, the sower, owned the land, *D* could sue on a claim *in personam*. From early times *C* would almost invariably be liable on an *actio furti* when he acted *mala fide*, and on principle there seems no reason why a praetorian remedy, probably *in factum* and based on the act of *C* rather than a *condictio* on *C*'s unjustified enrichment, should not lie. In both the *actio furti* and the possible *actio in factum* the basis of damages would, of course, be the value of the seed or plant *when taken*.

In cases where a third person is involved, *e.g.* where *E* sows *F*'s seed in *G*'s land, the arguments to be suggested for analogous cases in *inaedificatio* would be equally valid.

(v) *Inaedificatio* is the erection of a permanent structure securely upon a foundation in land. Essentially movable erections are naturally irrelevant to *accessio*. The principles are similar to those in *plantatio*, but are complicated by the rule of the Twelve Tables forbidding demolition of dwelling-houses and thus creating an artificial inseparability. This complication in turn led to an amazing doctrine that the materials of another incorporated into a house without his consent remained his property even though they could not be recovered while the house stood and even though the structure itself, viewed independently, belonged to the land-owner. Thus the land-owner owned and possessed the house, but not the materials; the lack of possession prevented their being usucaped. Once the house fell down or was illegally demolished the ownership in the materials ceased to be dormant and *vindicatio* could be sued out for them.

Here again there is the division into cases of *A*'s using his own materials on *B*'s land and *C*'s using *D*'s materials on *C*'s land. In the first case the remedy was primarily that of resistance of a *vindicatio* by an *exceptio doli*, provided that *A* was *bona fide*. This *ius retentionis* or 'lien' would enable *A* to recover expenses, *i.e.* cost of labour as well as of materials. However, he would recover all those only to the amount by

which *B*'s land had been enhanced in value. *B* could not be expected to pay more than he had received in benefit, nor to give *A* more than the costs of the unauthorised work in the event of the enhancement being greater than those costs. If *A* were in bad faith, he would be assumed to have made a gift of materials and labour and could raise no *exceptio*.

This reasonably simple (if harsh) solution is, of course, not the end of the matter: more intricacies must be added. So, if *B* cannot pay *A* because he is too poor, it is felt wrong to exclude *B* from his land or make him sell: that would be too great an invasion on an innocent *dominium*. *A*'s lien therefore is lost, but it seems that perhaps in the classical period, and certainly under Justinian, *A* may remove from the house some of the materials. This *ius tollendi* is limited: obviously the structure must not be injured and parts not removed must not be (appreciably ?) damaged; the right may not be exercised except to reduce *A*'s financial loss, and thus not in spite alone; *B* may even insist on keeping the removable materials if he pays their value. Surprisingly, Justinian allows this *ius tollendi* even to a *mala fide* possessor despite his having no *ius retentionis*. Presumably any materials that are not removable and are not paid for by *B* remain *A*'s and will be claimable upon the falling of the house. However, there seems to be no action of any sort to claim compensation: only the indirect pressure of these two rights was available. So if *A* loses possession and his *ius retentionis*, he loses also his *ius tollendi* and must stoically await the fall of the house. Justinian, again surprisingly, allows a *mala fide* builder to sue for the materials when the house falls, despite the presumption of gift.

Where *C* builds on his own land with *D*'s material, *D* may sue *C* on the *actio de tigno iniuncto* for double the value of that material. This action was given by the Twelve Tables, probably as a mitigation of the rule against demolition. There are several mysteries about it. It seems clear that it lay only where the materials had been stolen by someone and also that against a *bona fide* builder it extinguished the right to reclaim upon demolition. However, its relation to the seemingly more attractive proceedings based on *furtum* is unknown, even though *C* was as likely to be the thief as not. In the absence of theft mere waiting for the fall again seems the only consolation for *D*: there is no evidence of *ius tollendi* ever arising

except where the remover is in possession. However, again on general principles of *accessio*, an *actio in factum* for the value of the materials might have arisen in the late classical period or after.

For the case where *E* uses *F*'s materials to build on *G*'s land there is no authority at all. Presumably *F* would have the *actio tigno iniuncto* or *actio furti* or *actio in factum*, if such existed, against *E* according to the circumstances, but the existence or incidence of these remedies may have depended upon *E*'s being in possession. As against *G*, *F* had merely the postponed right in the materials. If *E* exercised his *ius retentionis*, *F* might have an *actio in factum* or a *condictio* against him for such part of any payment by *G* that could be attributed to the materials as opposed to the work, but whether there was any means of forcing *E* directly or indirectly to exercise the right is completely unknown. If *E* exercised a *ius tollendi* there is no doubt that *F* could vindicate any of his removed materials, but again there seems to have been no ready way of enforcing the removal.

(b) *Accessio* with movables alone.

Where two things became merged there was not necessarily an *accessio*, for that only arose where there were principal and accessory. If there was no *accessio* the case was either *commixtio* or *confusio* (or *specificatio*, *post*, p. 186). This distinction is best based again on feasible separability. In *commixtio*, where separation was reasonably possible, ownership in the constituents (e.g. black beads put among white) would remain unchanged unless the various owners had agreed on some change. In *confusio*, e.g. where wines were mixed or, probably, similar grains, the result would be owned in common in the absence of agreement to the contrary. If the *confusio* has caused some loss to the party not responsible for the mixing some action might conceivably lie for the delict of *damnum iniuria datum*.

If the *res* could be regarded as principal and accessory there would be *accessio* to the principal if they were practically inseparable. Cases of weaving and mending (*textura*) are at first sight incorrect because there seems to be separability. However, considerations of cutting up, difficulty and cost of unpicking, and possible fading might justify a general rule of

presumed indivisibility (as in *plantatio* ?) or at least explain some particular cases. The clearest example of separability is the distinction between soldering (*plumbatura*) and welding (*ferruminatio*), the latter effecting a permanent joining. The major difficulty is ascertaining which constituent is principal, and various different tests are postulated and followed quite inconsistently. It does not need the application of any test to decide many clear cases : that paint accedes to a cart, a patch to a coat and dye to a wool is self-evident. Any deduction from them will be a dangerous rationalisation. Thus imagining them as they would be if separate and relating their picture to that of the whole is no help where one cannot decide how one pictures the whole. Thus a fine gem may be worn as a brooch or be a part (indeed the most important part) of a necklace. Is the setting accessory or the gem ? Any conclusion will be by a hair's breadth and is likely to be intuitive rather than reasoned. Value may enter into the judgment, rather naughtily, where there is no physical solution. The Romans are clear in respect of lettering, even of gold, on a parchment : the parchment, albeit the cheaper constituent by far, is the principal. The poet who abstractedly pens his masterpiece on a menu card confers ownership of the valuable first manuscript upon the restaurateur. But the painting on another's canvas caused them much loss of sleep. Justinian settled ownership on the painter as Gaius had done before. Gaius rightly treats the case as an anomaly ; Justinian alludes to the possibility of great value. The suggestion that the case would be better treated as *specificatio* is very attractive : one can claim that the result is to be thought of not as canvas but as a painting, and in any case it is the work and skill, not the oils, that are crucial. Still, a law that could distinguish painting from illuminated script certainly deserves awe, if not respect.

As for compensation the rules seem to be : (i) if the person who does the act loses his ownership by the *accessio* his only remedy will depend upon his retaining possession and meeting a *vindicatio* with an *exceptio doli*. Under this he should secure his costs for material and labour provided he acted *bona fide* believing he owned the other material. Whether there was in this case a limitation to the increased value of the principal is quite uncertain. If he had lost possession there was apparently no remedy. In any case, if he knew of the other's rights

he can plead no *exceptio* and will normally be guilty of theft. (ii) If the one who acted acquired *dominium* by *accessio*, he would be liable for *furtum* if *mala fide* and, at least in later law, to an *actio in factum* otherwise. The treatment of compensation in the *pictura* case by both Gaius and Justinian is utterly confusing; one may hazard the guess that the general rules stated would apply there also.

3. *Specificatio*

Specificatio is another field for academic speculation and confusion and it is often hard to distinguish from *accessio*. It is the production of a new form of *res* out of one or more *res* by a more or less skilful process. Common examples are a ship out of timber, wine out of grapes, a statue out of bronze. Quite when a new form emerges is probably settled as a matter of common opinion: would people generally consider the product a new, rather than just an improved or altered, thing? It is difficult to see how on any more scientific test wine should be a *species* different from grape juice but scrambled egg still be egg. The amount of skill or effort in the process could be a criterion, but it would be almost as rough a one and would depend much on opinion.

In the classical period the production of a *nova species* was one of the grounds of dispute between the schools. The Proculians held that as the *res* was *nova* it belonged to the maker, whether as reward for his creation or by reason of his being first *occupans*. The Sabinians, on the view that no *res* could exist without the raw material, contended that ownership was in the former owner or owners. Justinian accepted, or originated, a not over-satisfactory compromise: if the new *species* was reducible to its basic material (e.g. a statue to bronze by melting, whether or not it had been a cup, a spear or even a statue before) ownership remained with the owner of the material, but if it was not (e.g. wine back to grapes) the maker was *dominus*. Perhaps a statue made out of stone, because it was a lump of stone however fashioned, did not belong to the sculptor; on the other hand there was no way of reducing it from a statue without diminishing it. Examples like this give more credit to the ingenuity than to the sense of the compilers. Reducibility, like severability, depended probably on feasibility rather than ultimate possibility.

If the raw materials for the process had belonged to different owners the principles of *commixtio* and *confusio* would be relevant if reducibility were possible. A statue fashioned from an alloy of copper and silver would belong to the owners of the copper and of the silver, separation being possible on reduction: their ownership would presumably be in proportion to the value of their materials, but either could probably call for separation. If it were made from gold and silver there was no severability and ownership would just be common and proportionate.

Principles of compensation were presumably similar to those in *accessio*. The maker might be liable for *furtum*, and if he acquired the *nova species an actio in factum* (or perhaps some action for *damnum iniuria datum*) might lie. If the maker did not acquire he should have his *exceptio doli* for his labour and skill against a *vindicatio*; again, there was probably the limit of the increase in value.

4. Acquisition of Fruits

In the normal case the *dominus* of a *res* will be the natural person to acquire anything produced by that *res*. Even if one does regard the products as new things, the proposition is so self-evident that one need not ascribe his acquisition to *occupatio* or any other such mode. However, cases may arise where another has control of the *res* and is entitled to such products. Two main classes of such persons may be distinguished: those who must collect the products before they become owners, and those who acquire immediately upon separation from the *res* in whatever way. The processes of acquisition are respectively called *fructuum perceptio* and *fructuum separatio*. The point of distinction seems to be that the latter class are persons who have *possessio*, whilst the former have no more than *detentio*. Although this might be regarded as coincidental it seems another example of the importance that *possessio* achieved in the Roman mind as a natural basis for ownership.

The term *fructus* included the natural produce of any *res corporalis*, movable or immovable. Apparently it included even minerals in land when extracted. It covered not only the young of animals and fruits and crops, but manure, compost, flowers and seed, twigs and wool from sheep. The child of a slave was not, however, *fructus*.

(i) *Fructuum Perceptio*. There are two main cases, that of the *conductor* (especially the *colonus* of land) and the usufructuary. However, others might occasionally arise. Thus, a borrower under *commodatum* and a deposittee might presumably be given permission to take by the *dominus*, and this would operate as a *traditio* of the *fructus*, a form of *traditio brevi manu* perhaps. It was this *traditio* that was really the basis of acquisition in the case of the *colonus*. Under his contract he would be entitled to the produce of the land — it was the essence of the contract for him. However, he had no right in that produce until he had severed it himself whilst the permission was in force. Until gathering gave him ownership his legal position was precarious. He had, of course, his *actio conducti* against his landlord if permission was wrongfully withdrawn, but that lay only in damages and had to be sued out. Meanwhile he could touch none of the *fructus*, even those he had cultivated himself, without committing theft. It is strong evidence of the poor legal standing of the *conductor* generally and of the serflike condition of the *colonus*.

The usufructuary had, on the other hand, a definite right to the fruits and could take them independently of the permission of the *dominus*. His need to gather is a trifle strange in view of his indefeasible right to the fruits. It is presumably based upon his lack of *possessio*, but the connexion is not logically necessary. Acquisition is not dependent on *traditio* as in *conductio*; perhaps it is a form of *occupatio*, but, even so, the thing is not *res nullius* but '*res domini*' until the gathering. The rule must be accepted without any very satisfactory explanation. The *perceptio* gave *dominium*, even of a *res mancipi* according to the Sabinian view. However, whilst the *dominium* would normally be absolute, a difficulty arose where the usufruct was a flock or herd (*grex*). Here there was a duty upon the usufructuary (or his heir) to make up for the members that died (*summissio*). The nature of this duty is very uncertain: it may well have been a mere *obligatio*, giving the owner of the flock no right to any of the young, but probably subject to a limit in numbers of the young actually produced. This *obligatio* would very naturally be met by using the young to replace the dead and the old. On the other hand, this may not have been the result of a convenient and universal practice but of a rule of law that gave the *dominus gregis* an actual *ius*

of some sort in the young. This would certainly give the *dominus* security for his interest in the event of the usufructuary's insolvency. Indeed the jurists tend to regard the ownership of young as being in suspense, if only after a vacancy in the flock has arisen. Even so, ownership seems to depend on an act of appropriation by the usufructuary: when he designates a lamb to replace a sheep the ownership in the lamb vests in the *dominus gregis*, while the old sheep or its carcase (automatically?) becomes the usufructuary's property. It is probably safest to regard the position as basically one of *obligatio* — but with limitations and safeguards — rather than as one of *ius*. The mere fact that the young might be of a different sex from the old one, and thus vary in value generally or in usefulness to the *dominus* in particular, makes any solution on the latter lines impractical.

What constituted *perceptio* is not clear. It would normally be an act of the acquirer or his agent and might consist in merely severing or in collecting after severing. Thus reaping would be sufficient without stooking; apples on the tree would be acquired by the act of picking, windfalls by being gathered. If severance occurred before *perceptio* the ownership was in the '*dominus rei*' until the usufructuary managed to reduce it to his own *dominium*. This meant that if a third party took the apples from the tree or from the ground neither the usufructuary nor the *conductor* had a *vindicatio* or even the quasi-proprietary *condictio furtiva*: these belonged to the *dominus*. However, they would have some form of *actio furti* because theirs was the main *interesse* in the *fructus*. Presumably the *dominus* himself might be liable for *furtum* if he took them before the usufructuary could. There is dispute as to *perceptio* of young of animals. It is difficult to know whether any act was necessary, or whether, exceptionally, mere *separatio* would give ownership. The latter rule would be the more convenient.

(ii) *Fructuum separatio*. Two cases (the *emphyteuta* and the *bona fide* possessor) are usual, but others could probably occur where there was agreement. Thus it could be that the *precario tenens* and the pledgee acquired *fructus* by *separatio* if the parties agreed. This would be the logical result if the mode of acquisition depended on the incidence of *possessio*. However, it might well be that ownership arose only because

of the permission of the *dominus*, as in the case of the *colonus*, and so *perceptio* was necessary. There can be no certain answer.

In the case of the holder of *ager vectigalis* and his successor, the *emphyteuta*, the position was clear. With his perpetual lease and full *possessio* he was so near to being owner that it was natural for the *dominium* to be his on separation.

The other case is not so easy — the *bona fide* possessor. In the first place there is the question why he should acquire at all. He holds not as a delegate of the *dominus* but in spite of him. He has no interest, even contractual, in the land or other *res*. It is probably a rule of a sympathetic character based upon the likelihood of there having been labour on his part and of his being very severely prejudiced by any stricter rule. In any case he acquired both cultivated and uncultivated *fructus* (*industriales et naturales*) with full *dominium*, and it was irrelevant that he could not usucapere. Another possible reason for the concession by the law is that usually the *bona fide* possessor would be generally thought of as owner and often would never be discovered not to be so. In such a case the rule saves all complications where others than the true *dominus* and particularly where thieves are concerned. The bonitary owner, of course, acquired without question.

The next problem is that of supervening *mala fides*. As soon as the possessor knew he was not owner he should have forfeited his privilege and stood as any *mala fide* possessor. However, the artificial rule in most cases of *usucapio*, that only the start of possession was relevant to the question of *bona fides*, causes severe complications. If the rule has no application at all, odd situations arise: if *A* in good faith takes possession of *B*'s flock and begins *usucapio* he will acquire the whole flock in a year (before Justinian); however, if he learns the truth five months after the beginning, all lambs born before then will be his but all lambs born in the next seven months will not; thereafter his ownership of new lambs will depend on whether they are born of the original flock (now his by *usucapio*) and the lambs of the first five months or of the lambs of the seven months. He would, therefore, be likely to be a genuine *dominus* of the majority but a permanent *mala fide* possessor of a minority. The logic is excellent, but the result is really too grotesque and cumbersome to be true. Perhaps the best rule would have been that (i) the privilege

lasted only as long as the *bona fides*, so that a possessor who could never usucapere or was stopped before he did usucapere would have to account for all *fructus* arising whilst he was *mala fide*, with the exception that (ii) where *usucapio* was completed, all *fructus* arising during the course of *usucapio* accrued to the new owner. However, this rule does not seem to have been accepted by the texts.

The last major difficulty is the rule that a possessor was bound to account for all *fructus* unconsumed at the moment that the true owner sued or obtained judgment. The rule may well have been very late, perhaps the work of Justinian. There was not just an *actio in personam* for their value, it seems, but the *vindicatio* could be brought. Analytically the result is untidy: *separatio* does not confer ownership, or at least unconditional ownership; only *consumptio* does that and ownership in a *res* vests only by its being destroyed. But the legislator was not likely to be worried by analysis: to him it would seem just that the long-suffering owner should be able to recover the *res* and all that derived from it and still existed, whilst at the same time the possessor was still relieved of the harsh burden of paying for what was gone. The distinction between repayment and restitution is just as sheer and as capricious in operation in English law. What *consumptio* comprised is also in doubt. To exclude sale from the concept so that the price, if identifiable, should be recoverable would logically lead to ideas of tracing — *i.e.* not stopping at the price but following it into objects upon which it is in due turn expended. Such a process is unlikely, and despite some evidence to the contrary it is more probable that sale counted as *consumptio*, just as a genuine gift should do.

Finally it must be noted that the term *fructus civiles* is found and it covers rent, hire and similar payments. Such *fructus* have no relevance here. Ownership in them passes from the payer by *traditio* and if the payee is not entitled to it (*e.g.* if a *mala fide* possessor) the owner of the *res* from which it is '*fructus*' has no *vindicatio*, but only some *actio in personam*, probably a *condictio*.

5. *Thesauri Inventio*

Thesauri inventio is the finding of treasure. Treasure consists of jewels, coin, bullion and the like secreted for safe keeping and never recovered by the owner, who cannot now

be traced. At first, not the finder but the owner of the land was probably entitled. Hadrian gave it to the finder if it was on his own land, or if he found it by chance *in sacro aut in religioso loco*. But the finder who found treasure on another's land by chance shared it with the owner of the land, even where the land belonged to the Emperor, or to the *Fiscus*, or to some city. If the finder found it when searching for it, the owner of the land took all. Later, the *Fiscus* shared with the finder what was found on lands belonging to the Emperor or the State or in *religioso loco*. Under Justinian the position is not clear on some details because of the mass of legislation there had been over the centuries, but the main rules remained basically as stated.

If the valuables had been lost, not secreted, and the owner were untraceable, the rules of treasure trove would not apply. Probably the finder just kept a possession that was better than anyone else's: *usucapio* should not have been possible for him because of absence of *iustus titulus*.

(B) Derivative Acquisition

1. *Mancipatio*

Mancipatio was the primary *iure civili* method of transfer. It was very ancient and very formal, and it seems always only to have concerned transfer of *res Mancipi*. It started almost certainly as a genuine, well-witnessed sale. The whole ritual is probably explained by the usual fears and prejudices of an early people: the publicity would counter later allegations of theft and discourage reckless alienation of important property. Perhaps the early *paterfamilias* could not transfer the means of the household's livelihood without a sale for which exact value had to be given. The form as we know it is as follows —

The acquirer takes hold of the slave (or other *res*) with his hand (*manu capit*) in the presence of the transferor, five adult citizen witnesses and another adult citizen (the *libripens*), who holds a bronze balance, and recites a set formula: '*hunc ego hominem ex iure Quiritium meum esse aio, isque mihi emptus esto hoc aere aeneaque libra*'. He thereupon strikes the balance with a piece of bronze (*aes*), which he hands to the transferor. He is now *dominus*.

The need for the grasping meant that the *res* itself always

had to be present — a rule to be expected in an early society and one preserved in *vindicatio* and *cessio in iure*. However, it seems that in the one case of Italic land, which may have become alienable much later than the movables, there could be *mancipatio* at a distance from it. Probably, as in the *vindicatio*, a clod of earth, not necessarily from the actual land, could be grasped as a symbol. We have no idea how the rustic servitude was transferred and can only guess that it followed a pattern as near as possible to that in *mancipatio* of land.

As it was a *iure civili* ceremony only those with *commercium* could take part as actual parties, *libripens* or witnesses. However, both a son in power and a slave could acquire for their *pater* or master by use of an adapted form, and it seems that they (or at least sons) might be authorised to stand as transferors. As regards the words used, '*hanc rem*' was the normal substitute for '*hunc hominem*' for *res* other than slaves. The formula is in two parts. The first ('*hunc . . . aio*') is the same as in *cessio in iure* and *vindicatio* and asserts the acquirer's ownership of the *res* according to civil law; the second justifies the claim by a declaration of purchase in due form. The transferor's role was, as so often in Roman law, a passive one, and any words he spoke, though customary, were not essential to the transfer. The lump of bronze would have been the price before coined money was introduced into Rome. This introduction may well have been a century or more after the Twelve Tables, and, even before it, it is possible that exact weighing was not necessary and would occur only when the transferor was a genuine vendor. However, the whole history is open to the widest range of conjecture and one can say little more with certainty than that what started as a transfer upon simultaneous sale became in the later Republican period a mere method of conveyance. It seems clear that in that and the classical periods it was normal to state the price paid upon a *mancipatio* at the end of the formula spoken and that in gifts and transactions other than sale a price of one *sestertius* was stated (*mancipatio nummo uno*). Whether this latter usage arose from a rule of the Twelve Tables that may have prevented the acquisition of *dominium* till the price had been paid or security given or from the desire to avoid the transferor's *auctoritas* is quite uncertain.

As regards the effect of the ceremony the acquirer was put

in the same position at civil law as the transferor had been. If he were evicted by a better title he would have the *actio auctoritatis* for double the price against the transferor, but this remedy was only available during the period for *usucapio*, even, it seems, if *usucapio* was not possible in the particular case. In the case of land, the *actio de modo agri* lay to recover twice the proportionate part of the price of the land when its area had been overstated. Transfer was immediate and unconditional: any *dies* or *condicio* rendered it void. Servitudes (both praedial and personal) could be deducted in the formula, and perhaps praedial ones over neighbouring land could be added. An agreement to retransfer in certain events (*fiducia*) does not seem to have been part of the ceremony, but where made, it was closely associated and received legal recognition.

Mancipatio remained in full force through the classical period, but for many years it had been very frequent to make a written memorandum of the event. Gradually the writing would be taken as evidence and the witnesses less called upon, until most mancipations would never be properly performed, just stated so to have been. By the fourth century A.D. *mancipatio* was dead for the transfer of movables; perhaps the *cognitio extraordinaria* had by then virtually completed the process of making bonitary ownership as effective as Quiritary and thus had induced the universal use of *traditio*. However, the rule allowing *mancipatio* of 'absent' land was a great advantage over *traditio* and thus the institution remained extant for a long time in Italy. There are traces of it there even after Justinian had finally abolished the distinction between *res Mancipi* and *nec Mancipi*.

The institution of *mancipatio* was adapted to various purposes beyond that of conveyance. It, or some institution developed alongside or out of it, occurred in the creation of *mancipium* and the early *nexum*, in the marriage by *coemptio* (and its further development, *fiduciaria*), in the will *per aes et libram*, in *emancipatio* and *adoptio*, and in discharge of a debt (*solutio per aes et libram*). In addition, the *mancipatio cum fiducia* was the first Roman form of real security and the forerunner of the Roman law of mortgages.

2. *Cessio in iure*

Cessio in iure was the other civil law method of transferring property and the only normal one for the creation of servitudes

other than the original rustic ones. It was a cumbersome method, but a typical development of a law in a stage of rigid formalism. It involved a claim before the praetor (*in iure*) by the intended transferee that the property was his, in the same words as in *mancipatio*. Thus if a slave was to be transferred the alienee took hold of him and said: '*hunc ego hominem ex iure Quiritium meum esse aio*'; the owner made no counter-claim, and the praetor thereupon awarded the slave to his new master (*addictio*). Whether it was in origin a collusive *vindicatio* (which it greatly resembles but differs from on important details) or a true conveyance is much disputed. It was certainly cumbersome and would rarely be used where *mancipatio* or *traditio* was available. It could convey both *res Mancipi* and *nec Mancipi*, but was mostly employed for transferring inheritances and the creation of servitudes, for which, as far as personal and urban servitudes were concerned, it was the only direct method. There is no evidence of any *actio auctoritatis* or *de modo agri*, but Gaius associates it with *mancipatio* for the creation of *fiducia*. Perhaps *cessio in iure* originated when *mancipatio* was necessarily a sale and a *paterfamilias* wished for some reason to alienate for less than full value: the approval of the praetor in public and his *addictio* would prove the propriety of the transaction. But its early history is as much a field of conjecture as that of *mancipatio*. All that can be said with any confidence is that it antedates the Twelve Tables but is younger than *mancipatio*.

Like *mancipatio* it could not be conditional or postponed in operation. *Deductio* of servitudes was possible here also. *Cessio* lasted out the classical period, but vanished soon afterwards as a conveyance. Justinian did not even have to abolish it.

Again like *mancipatio*, it had adaptations outside the law of conveyancing. Thus it was used to transfer *tutela* and was important in *emancipatio* and *adoptio*. *Manumissio vindicta* may be treated as a form of *cessio*, although it is related to the *causa liberalis*, not the *vindicatio*. These adapted versions did last till Justinian.

3. *Traditio*

Traditio was the *iure gentium* mode of conveyance. It is simple delivery, the handing over of a *res* with intent to pass

and to receive ownership. It applied to land as well as to movables, but until after the classical period it could do no more than transfer the limited interest in provincial land and, technically until Justinian, confer bonitary ownership in Italic land.

Delivery is either actual or constructive. Putting a book on the transferee's desk and a letter through his door are clear examples of effective delivery. One could also transfer by pointing to the *res* and indicating the necessary intent, but the *res* had to be in sight and capable of being taken immediately by the transferee (*traditio longa manu*). A probable extension of this is transfer by delivery of means of control, the stock example being the key to a warehouse. This made the transferee immediately owner of such *res* in the warehouse as were intended: intent excluded all other *res* there although there was control of them. However, the rule (somewhat erroneously labelled 'symbolic delivery' by some) may have been limited at all periods to cases where the warehouse was in sight or so near as to enable the transferee to proceed there directly. An extension of the idea is conveyance by transfer of documents of title, and this may have occurred late in the Eastern Empire where documents relating to land became virtual title deeds.

If the transferee is in control with either *possessio* or *detentio* (e.g. as pledgee or borrower) the transferor could give him ownership by a mere indication of intent even in the absence of the *res* (*traditio brevi manu*). The converse case was where the transferor wished to give ownership but wished to retain control temporarily, e.g. to read a book he had just bought. This was recognised as passing ownership immediately merely by indication of intent (*constitutum possessorium*), but the development may well have been post-classical.

The intent for *traditio* had to be in both parties. More or less as evidence of this intent a *iusta causa*, some lawful transaction that gave a motive for that intent, had to be established. It might be gift, sale, exchange, payment of a debt, or one of several more *causae*. Apparently a mistake was not fatal if there was intent to pass ownership of the thing in question, e.g. if both thought that money was owed when it was not. Even if the transaction itself was mistaken, the transferee probably became owner if both intended that. So if *X* handed

over money as a loan to *Y* and *Y* thought it a gift (or *vice versa*), *Y* was owner, for both gift and *mutuum* gave ownership; if *X* handed over a book on loan and *Y* thought this a gift, he did not become owner, because *commodatum* does not confer ownership. These are cases of putative *causa*, and there is dispute whether they were effective in classical times. Where there was any mistake that did not prevent the ownership passing, a *condictio indebiti* would normally lie to indemnify the losing owner.

Traditio could be effective to pass ownership to an unknown person, as where a popularity-seeking official flung coins into a crowd (*incertae personae*). As *traditio* was informal *dies* and *condicio* could make it postponed or conditional. However, *deductio* of a servitude was not possible in the classical period, nor could a *fiducia* be attached.

An odd rule is attributed by Justinian to the Twelve Tables. This is that ownership does not pass where there is a sale until the price has been paid, security taken or credit given. It is generally thought that it originally referred to *mancipatio* and the compilers transferred it to *traditio*. Much depends on what was meant here by giving credit, particularly when contrasted with security. It could mean that there had to be an express agreement not just an implied one, or it might be merely a safeguard against possible mistakes and sharp practices, *e.g.* where the transferee gets possession of goods in transit earlier than expected or is later found to have paid less than was due or paid in forged money.

4. A note on *Donatio*

Donatio (gift) is not treated as a mode of acquisition by Gaius, and Justinian would have been more logical had he omitted it. A gift has two aspects: where the intention to give and the gift are simultaneous, the gift is obviously not a *modus acquirendi* but a *iusta causa* for *traditio*; if the case is merely one of a promise of bounty it would, so far as actionable, be more properly treated under the law of contract. Further, a gift does not necessarily take the form of transferring *dominium*; it may, *e.g.*, consist in the release by a creditor of a debt owing to him. Justinian speaks of gift as a mode of acquisition, but this is not so; it is merely a *iusta causa* for the *traditio* which transfers the ownership. He was

perhaps misled by the changes he had made in the *pactum donationis*. This was a mere agreement to give, which, without legal force under Gaius, put the donor under Justinian under a legal obligation to make delivery; but it was delivery that operated to pass ownership. There were a few exceptional cases where the ownership passed without delivery as a matter of special legislation, but these cannot affect the general principle.

Under this title Justinian discusses two distinct forms of donation: *donatio mortis causa* and *donatio inter vivos* (including *donatio propter nuptias*, which has been described already, *ante*, p. III).

A *donatio mortis causa* was a gift in anticipation of and conditional upon death, and in the time of Justinian it had to be completed by delivery; but if it were made in the same form as that required for codicils, with five witnesses, it would operate like a legacy to transfer the property upon death. The *lex Cincia de donis* (*infra*) had no application to it, nor did the rule excluding gifts between husband and wife. A, who expects to die, wishes rather to keep some piece of property himself than that the donee, B, shall have it, but prefers that B shall have it rather than the heir. Such a gift, effectuated by delivery, might take one of two forms: A may give the *dominium* of the object to B at once, subject to the condition that the *dominium* is to be retransferred to A if he does not die, or A may merely give B the possession of the object, B's acquisition of the *dominium* being conditional on A's death. In late law, *dominium* seems to have reverted automatically in the former case without need for retransfer, so that a *vindicatio* could then be brought by the donor in either case on his survival or on revocation. A *donatio mortis causa* was revocable at any time before death, not just at the testator's wish but by his insolvency or by the donee's death. It was thus unlike a *donatio inter vivos*, which, as a general rule, could not be revoked; and since a *donatio mortis causa* took effect, at any rate in possession, at once, it was unlike a legacy, which did not take effect until the donor had died and the heir had entered. Formerly there were many differences in the way in which donations of this sort and a legacy were treated; e.g. they were not subject to the *lex Falcidia*, or to the *leges Iulia et Papia Poppaea*; but these differences were gradually removed,

fideicommissa became attachable and donations *mortis causa* were made subject to the same rules as legacies. In Justinian's time few differences were left, the most important being (a) the essential distinction that a *donatio* took effect whether or not there was a valid will, and (b) a *filiusfamilias* could, with the assent of his *pater*, make a good *donatio mortis causa* out of his *peculium profectitium*, though he could not bequeath it.

Justinian also introduced a completely new form in which there was no need for a transfer of possession and under which ownership was conferred only upon death. It was effected in the same way as a codicil, with the five witnesses. It was very close to legacy, but the distinctions stated applied here also.

Donatio inter vivos. It would seem that under the old law there were only three ways in which a gift of this sort could be made. Assuming *A* wished to benefit *B* —

(i) *A* might make over the subject-matter of the gift by *mancipatio* or *cessio in iure*, or by *traditio*, if *nec mancipi*, for all of which *donatio* was a *iusta causa*; or

(ii) *A* might bind himself to make the gift by the formal verbal contract, *stipulatio*; or

(iii) if *B* were his debtor, *A* might release the debt by *acceptilatio*.

In other words, a mere informal agreement to give had no more effect in early Roman law than it has in England today. The *lex Cincia* (c. 204 B.C.) prohibited (except in the case of gifts in favour of near relatives and patrons) all gifts beyond a certain (but unknown) amount, and seems to have required all gifts over that amount to be actually transferred (*e.g.* by *mancipatio*, given full effect by *traditio* or the like), otherwise they were to be revocable by the donor, but there was no other penalty, so that the law has been described as one of imperfect obligation (*lex imperfecta*). It follows that if the gift had been delivered, even though delivery alone might not suffice to transfer the ownership, the *lex* could have no operation; but if the property forming the gift had been, say, mancipated but not yet delivered, then, though the ownership passed, if the donor changed his mind and refused to deliver, thus forcing the donee to vindicate, such *vindicatio* could be defeated by the donor by the *exceptio legis Cinciae*, but not by his heir. Antoninus Pius provided that, as between parents and children, a mere informal agreement should be actionable.

Gifts exceeding 200 *solidi* were required to be registered in the *acta (insinuatio)* by Constantius Chlorus unless made in favour of people excepted from the *lex Cincia*, but these too were brought under the ordinary rule by Constantine, who required registration for all gifts. Justinian considerably modified the law —

(1) He seems to have generalised the provisions of Pius, not confining these to children. A *pactum donationis* was to be binding. Hence in the case of a *res corporalis* the donor was under a duty to make *traditio*, and in other cases the promise was made enforceable by action.

(2) The gift was only to require registration if it exceeded 500 *solidi*, and certain gifts, even though of greater amount, were valid without registration; e.g. *propter nuptias*, to redeem captives, or made by or to the Emperor. Gifts requiring registration and not fulfilling the requirement were void only as to the excess.

(3) He simplified the law as to revocation (which had previously been exceptionally allowed) by providing that any donor might revoke, but only for the legal reasons Justinian specified; e.g. where the person to whom a gift had been made on condition failed to comply with it, or where he was guilty of gross ingratitude. Here again Justinian seems to have allowed revocation to work automatically without the need for retransfer.

(C) Prescriptive Acquisition

Prescription can operate in three ways —

(i) Acquisitive prescription is the conferment by law of ownership or some right on one who has possessed the object or enjoyed the right for a certain length of time.

(ii) Extinctive prescription occurs where ownership or some other interest is taken away by law from someone who has not been in possession or enjoyment for a certain period. The effect is to leave the person with possession, or with the best right to it, in unassailable enjoyment of the property by virtue of his possessory remedies. It is to be noted that there is no need for the possession during the period to be in any one person: it is lack of possession that decides.

(iii) Adjectival prescription does not affect rights at all. It

is merely limitation of actions. After a set period out of possession the owner is barred from using the legal remedies to enforce his interest. Should the remedies be restored for any reason protection would, of course, be complete again because the ownership had never evaporated.

English law with its system of title rather than absolute ownership recognises generally only the two latter prescriptions. Acquisitive prescription is only to be found in respect of easements and other incorporeal rights over land. Roman law, however, developed a purely acquisitive prescription very early in its history and tended always to approach it with later institutions. This process made possible the absolute nature of *dominium*.

1. *Usucapio*

Usucapio was a *iure civili* means of acquiring *dominium*. It was at least as old as the Twelve Tables. The word '*usus*' can be roughly translated as 'enjoyment' and this was the early ingenuous notion of possession. The original periods, as fixed by the Twelve Tables, were in the case of immovable property two years, in the case of *ceterae res* (other things) one year. For *usucapio* to operate in favour of any given person, *A*, the following conditions had to be satisfied —

(1) *A* must actually possess the thing in question; he must have *possessio civilis* as distinguished from mere *detentio*; a person to whom goods had been entrusted for safe custody, *e.g.*, had only *detentio*, and therefore, however long he might hold them, he could never, by *usucapio*, acquire *dominium*, not even if he intended to hold them for himself, because of the rule *nemo potest causam possessionis sibi mutare*. As already seen, *possessio civilis* was normally the same as interdict possession, but some derivative holders, such as the pledgee, had the interdicts whilst the men they held from were still able to *usucapere*.

(2) *A* must have *commercium*.

(3) *A* must possess for the full period, but if he is *B*'s heir and *B* had been in possession say for three months, *A* can count this in his favour, provided *B* acquired in good faith, even though *A* might be aware of the flaw in *B*'s title (the reason being that the heir was regarded as continuing the *persona* of the deceased). Consequently, *e.g.* in the case of a

movable, *A* may complete *usucapio* in nine months. This was known as *successio in possessionem* and was firmly established in the classical period. Another development was the allowing of a buyer, donee or other transferee to add to his own the period in possession of his seller, donor or transferor. This *accessio possessionis* was juristically very different from the case of the heir and in no way a succession. It was thus a new departure and depended on legislation. It probably derived from the interdict *utrubi* and the imperial institution of *longi temporis praescriptio*, and a rescript of Severus and Caracalla (A.D. 199) enabling this *accessio temporis* in the case of a sale alone may well have applied only to that latter institution. Its application to *usucapio* occurred either after or very late in the classical period and it was only extended from sale to other cases of transfer by Justinian. For *accessio temporis* the transferee always had to begin his part of the possession in *bona fides*.

(4) There must have been no interruption (*usurpatio*); e.g. if *A* is usucaping a garment and he loses it, he must begin over again without counting his former possession, when he regains the garment. This is natural *usurpatio*. If *X* brought an action against *A*, claiming the garment was his, and obtained judgment in his favour, this was a civil *usurpatio*. *Usurpatio* could be utterly disastrous even though *A* recovered possession because now he might no longer be *bona fide* and so he could never usucape.

(5) Some things could not be usucaped. Examples are —

(a) *Res extra commercium*, such as land in the provinces (*provincialia praedia*), for they belonged to the Roman people or the Emperor, free persons (even though *bona fide* believed to be slaves), and things sacred and religious.

(b) Anciently, by the Twelve Tables, *res Mancipi* belonging to a woman under her agnate's *tutela*, unless they had been delivered with her tutor's *auctoritas*, but, as will be seen, there was an important exception.

(c) Under the Twelve Tables and the *lex Atinia*, *res furtiva* (stolen property), and under the *leges Iulia et Plautia*, *res vi possessa* (property taken by violence). Of course the original wrongdoer could not usucape even apart from these statutes, for he had not the *bona fides* which was necessary for usucapion; the statutes, therefore, aim at some subsequent

possessor and deprive of the advantage of *usucapio* even a person who has purchased from the thief for full value and without any knowledge of the defect in his title. The *vitium furti* (flaw of theft) and that of violent seizure which barred usucapion were purged if the owner knew where the thing was and could vindicate it. It was the owner's knowledge that was necessary, even though the theft or violence had been perpetrated against another. Gaius tells us it is not often that *usucapio* operates in the case of movables, for in Roman law everybody who, knowing a thing is not his own, sells or gives it to another, commits a theft. But sometimes *usucapio* may take place owing to the absence of any fraudulent intention on the part of the seller or donor: *e.g.* —

(i) *C* lends or deposits a horse with *B*. *B* dies, and *D*, his heir, innocently sells the horse to *A*. *D* has not committed *furtum* and *A* can, if ignorant of the circumstances, usucape.

(ii) *B* has a life interest (usufruct) and *C* the *dominium* in a female slave. Her offspring, as already stated, belong legally to *C*. *B*, under a genuine mistake of law (which, incidentally, would prevent *his* ever usucaping), thinks the child is his as part of the *fructus* and sells or gives it to *A*. *B* has not stolen the child and *A* can usucape. The general principle underlying these cases is that if both parties are in good faith the vendor does not commit *furtum* and the buyer can usucape. In the case of land, as there can be no *furtum fundi*, the seller cannot make the land a *res furtiva*; hence in cases of sales of land the buyer in good faith can usucape, so long as it was not at some time *vi possessa*.

Further examples of property which could not be acquired by *usucapio* are — (d) immovables in Italy forming part of a *dos*; (e) bribes taken by public officials, under the *lex Iulia repetundarum*; (f) the land of a *pupillus* and later of a minor, and perhaps eventually all property of a *pupillus*; (g) the property of the *Fiscus* or of the Emperor; (h) immovables vested in churches or pious foundations under the later law.

(6) *A* must have *bona fides*. Two classes of case arise. Firstly, he is lawfully in possession under the protection of the praetor, *e.g.* after *traditio* of a *res mancipi* from the true *dominus*, and here he knows he is usucaping but his intention is, of course, lawful. Secondly, owing to a reasonable mistake of fact, which must exist at the moment when possession

begins, he is in ignorance that the property belongs to another. (In the case of a sale the *bona fides* had to exist at the moment both of contract and of transfer.) Generally, subsequent *mala fides*, e.g. knowledge of some flaw, does not hinder acquisition, but until Justinian there may have been a rule requiring *bona fides* throughout possession where it began with a gift. *Bona fides* was probably not a necessity in early law, as certain exceptional cases indicate; the rule as to *res furtivae* made it hardly necessary then. Perhaps it arose as a juristic gloss when it became settled that land could not be stolen. *Bona fides* was presumed until the contrary was proved — a difficult burden. *Iustus titulus*, with which it was closely allied, was a much more difficult hurdle for the would-be acquirer.

(7) There must be *iustus titulus* or *iusta causa*, i.e. there must be some ground of acquisition recognised by the law, e.g. sale or legacy or order of the praetor. For instance, there is a *iustus titulus* if *A* has bought and received delivery of a *res Mancipi* but has failed to have it conveyed to him by *mancipatio*. If *A* is in the wrong and thinks there is a *iusta causa* when, in fact, there is not, e.g. gets possession of a thing which he thinks he has bought, whereas he has not, *usucapio* does not operate. But this doctrine is subject to qualification, and, where the facts are such as to justify the belief in the existence of a title, *usucapio* may sometimes be based upon *bona fides* alone. An example of this, which seems confined to sale, is where a person sells believing he has a right to do so, when in fact he has not, to one who takes in good faith. In all other cases there must be a real *causa*; a *causa putativa*, or one honestly believed to exist, will not do, though it suffices for *traditio*. So, where *A* finds an object that has been lost but he thinks it has been abandoned, he cannot *usucapere* because *occupatio* is impossible without the abandonment. Had it been thrown away by a non-owner, he could have *usucapied pro derelicto*. In all cases *A* had to prove the existence of a full *iustus titulus*.

Gaius describes three cases where a man can *usucapere* although he himself knows the property belongs to another, a species of *usucapio* which is called *lucrativa*, because, knowing the property is not his own, a man makes himself richer (by *usucapio*) at another's expense. The cases in question are —

(a) *Usucapio pro herede*. *B* dies, leaving no *necessarius*

heres. *A* may enter upon the possession of his estate or any part of it before the *extraneus heres* accepts and takes possession, and after possessing it for a year may become owner. The period is only a year, even if the estate comprises immovable property, which usually required two years. The lawyers in considering an *hereditas* did not regard its constituent parts but looked at it as an abstract legal unity, *i.e.* a *res incorporalis*; it was not therefore a '*res soli*', requiring under the Twelve Tables the longer period, but one of the *res ceterae*, for which one year was enough. For the existence of *usucapio pro herede* the following reason may be gathered from Gaius. A *necessarius heres* was so called because the law gave him no option; there could be no question of his refusing to act, and accordingly he had to perform the *sacra* and to answer to the creditors of the deceased in any event. In such a case there was no necessity for *usucapio pro herede*, which, in fact, had no application. If, however, the *heres* was not *necessarius*, but an *extraneus*, he did not become heir until he signified assent, and *usucapio pro herede* accordingly afforded a reason why he should hasten to accept the heirship. This in turn would provide some person at the earliest possible moment to carry on the religion of the family and to pay the debts. Gaius tells us, however, that in his time this kind of *usucapio* was no longer lucrative; which is accounted for by the fact that soon after the time of Cicero the lawyers refused to sanction the theory that an *hereditas* as a whole could be acquired in this way, although individual items of it (such as a slave or a horse) might, and by the further fact that Hadrian provided that even after the *usucapio* was complete the real heir might recover the *hereditas* or any item of it from the acquirer, whose title, however, remained good against third persons, *i.e.* any person except the heir, who tried to eject him. The heir's remedy was the normal *hereditatis petitio*, but it may not have lain against a *bona fide* usucaptor, who must, however, have been a rare character *pro herede*. In any case this usucapion disappeared within a century after Hadrian.

(b) The second kind of *usucapio lucrativa* was *usureceptio*; *i.e.* getting back by *usus* or *usucapio* the ownership of property which one once owned. *A* has transferred property either by *mancipatio* or by *cessio in iure* to *B*, so that *B* becomes legal owner or *dominus*, but the transfer is coupled with a trust

(*fiducia*) in *A*'s favour, either — (a) that *B*, to whom the property has been conveyed as security for a loan (*fiducia cum creditore*), will reconvey to *A* when the loan is repaid, or (b), there being no loan, that *B*, to whom the property has been conveyed for safe custody (*fiducia cum amico*), will reconvey on request. Then in either case, if *A* happens to get possession of his property again, he will by *usucapio* become owner in a year (even though the property is land); but in case (a) — of the loan — this will only happen (i) if *A* has paid the debt, or (ii) if, not having paid the debt, *A* has got possession in some way which does not involve either having leased the property from *B*, the creditor, or having obtained it from him at *A*'s request and during *B*'s pleasure. This second limitation must have gone a long way to exclude injustice from this *usucapio*, but it still leaves some harsh possibilities. Perhaps the explanation is that with the Romans real security was never as popular as personal and the Romans felt that if a man did not take reasonable care of the security that gave him priority over other debtors he should be left only to his *actio in personam* for the debt.

(c) The last case of *usucapio lucrativa* is another species of *usureceptio*, viz. *usureceptio ex praediatura*. *A*'s land has been mortgaged to the State, and the State has sold the land to *B*. If *A* regains possession of the land he becomes owner again in two years. This *usureceptio* is called *ex praediatura*, because *B* (the purchaser from the State) was called a *praediator*. It could, probably unusually, cover *res* other than land, the period then being just the one year. The explanation of so unjust a rule is again a mystery. Perhaps Roman society did not look too kindly upon *praedatores*, they being necessary evils, and the law desired to make them also zealous in the care of their property.

A fourth anomalous case arose when one had bought and received a *res Mancipi* from a woman without her tutor's consent. It was called *usucapio ex constitutione Rutiliana*, and was a classical period exception to the Twelve Tables rule excluding usucapion of such *res*.

2. *Longi temporis praescriptio*

Inasmuch as land in the provinces was a *res extra commercium*, and therefore unprotected by *usucapio*, imperial constitu-

tions devised an analogous means of securing long possession against disturbance, by means of what was known as *longi temporis praescriptio* or *possessio*, a method which was extended so as to embrace movable property as well, and to include *peregrini* who, not enjoying the *ius commercii*, could not benefit by *usucapio*. *Longi temporis praescriptio*, though it had the same object as *usucapio*, effected it in a different manner. In *usucapio* possession for the given period confers *dominium*. *Longi temporis praescriptio*, in its early form, did not: the holder was protected by the extinction of the plaintiff's right of action, supplemented by his own right to the possessory interdicts. Suppose, *e.g.*, that *A* was in possession in good faith and could show *iustus titulus*, that there was nothing against his possessing the thing in question (*e.g.* it was not a *res furtiva*), and that he had been in possession for a sufficient time. Then, if sued by *B*, a person claiming the land, *A* could insist upon having a *praescriptio* placed at the head of the *formula* by which the action was tried, to the effect that *B* was not to succeed if it were proved that *A* had, in fact, enjoyed the property for the necessary period — the periods being ten years *inter praesentes* (*i.e.* if both *A* and *B* resided in the same province) and twenty *inter absentes* (*i.e.* if they resided in different provinces). But probably long before Justinian it extinguished the plaintiff's title instead of merely barring his action and indeed probably became acquisitive prescription in much the same way as *usucapio*. Probably the majority of the *usucapion* rules (*e.g.* *titulus*, *bona fides*, *vitia*) were adopted into *praescriptio*, and the assimilation continued over the years. As seen already, *accessio temporis* was probably a notion that came to *usucapio* from *praescriptio*.

3. *Longissimi temporis praescriptio*

This was a development in the later Empire, beginning perhaps under Constantine. It was part of a general movement towards limitation of *actiones perpetuae*. Forty years' possession, however begun, barred a *vindicatio*. Later, Theodosius cut down the period to thirty years, at least for some purposes.

4. Justinian's Law of Prescription

By the time of Justinian the Roman Empire was centred on Constantinople in the area of former provincial land.

Ownership of such land had long been treated as *dominium* and the notion of *res Mancipi* had become obsolete. Moreover, prescription of movables had long since been too short in time in a large and complex society for justice to be served. Reforms were therefore long overdue. Amongst several that were minor, three really important reforms emerged.

(i) The term *usucapio* was now to be used for prescription of movables only. The period of possession was extended from the one to three years, but the other rules remained basically unaltered.

(ii) The term *longi temporis possessio* was correspondingly used for prescription of all land wherever situated. The ten- and twenty-year periods were retained as before, along with the other requisites.

(iii) The limitation rules seem to have continued with a few amendments. They were cases merely of barring actions and were mainly unconcerned with considerations of *bona fides* and *vitia*. However, Justinian did introduce a genuine new prescription under the name of *longissimi temporis praescriptio*. Thirty years' possession of a *res* (whether movable or immovable) was to give *dominium* to a *bona fide* possessor, although he had no *iustus titulus*, and even though the thing had been originally stolen, provided it had not been *vi possessa*.

IV

Iura in Re Aliena

These were rights that formed definite incumbrances upon the property of another. They were proprietary rights that could be claimed against the thing itself (*in rem*), not just rights that were enforceable only in damages against the person of the owner (*in personam*). There were many rights of this latter sort, based purely on contract. Such in particular were the normal leases: they never became an interest in land at all.

The number of interests *in rem* was quite limited; in the classical period the only true ones were those that Justinian included in the term 'servitude'. One or two others gradually developed into proprietary interests mainly as a result of the conferment of praetorian possessory remedies. Besides the

long leases and the various real securities, however, all rights outside servitudes remained firmly in the sphere of contractual obligation.

Of these true interests *in rem* it must be noted that in Roman law they could exist only over *res corporales* (especially land) and that that *res* belonged to another.

(A) Servitudes

Under Justinian's law servitudes were, like all *iura, res incorporales* and were proprietary rights either (i) annexed to the ownership of a definite piece of land and exercisable over another's definite piece of land — praedial servitudes, or (ii) vested in a definite person over the land or other *res* of another — personal servitudes. In the classical period the term seems to have been used only in respect of the first class, where one *praedium* (piece of land) *served* another. In the earliest period there were only a few even of the praedial servitudes and they seem to antedate the distinction of *res corporales* and *incorporales* so that in some respects they were treated very much as corporeal rights: thus a right of way (*iter*) was very closely associated (even confused?) in the early Roman mind with the path over which it lay.

General Principles of Servitudes

1. A servitude can be considered from two points of view, that of the person entitled to it, and that of the person (or property) subject to it. Viewed from the standpoint of the latter, there is never any duty to do something, but either (i) to permit the former to do something where the servitude is positive, *e.g.* to exercise a right of way, or (ii) not to do something which but for the servitude he would be entitled to do (negative servitude), *e.g.* not to build so as to obstruct the light which the dominant tenement is entitled to receive. There seems to be one exception, for in the case of a right of support (*servitus oneris ferendi*) there was a duty to keep the wall in repair. The duty may have begun as a mere contractual obligation, but this is doubtful and in the classical period it was definitely annexed to the land. It is best treated as an anomaly based on convenience and arising before an age of theory. The servitude was primarily a negative one (not

to remove support), but the positive duty was necessary to supplement it. Strangely enough the English law of easements and profits, with its great similarity to the law of servitudes and with the same general rule, also has its single exception: the ancient easement of fencing alone imposes a positive duty upon the servient owner.

2. A servitude can exist only over another's property: no man can have a servitude over his own property. Thus if *A*, the owner of Blackacre, has a right of way over a neighbouring property called Whiteacre, owned by *B*, then, if *A* were to buy Whiteacre, the servitude would be extinguished: *nulli res sua servit*.

3. A servitude can exist only over tangible property, and not with respect to a mere right: there cannot be a servitude of a servitude.

4. As there can be no justification for imposing a burden upon a person or his property unless there is a corresponding benefit to some other person or property, it follows that a servitude cannot be purely burdensome. Also, the advantage in the case of the personal servitude must be to the person designated (or his *familia*) and not third parties, and in the case of praedial servitudes it must be to the owner of the land in his capacity as such, not just collaterally in his personal capacity. A corollary of the rule is the maxim *servitus civiliter exercenda est*: a servitude must be exercised with due moderation, since the law merely tolerates such restrictions on ownership as are absolutely essential in the interests of another.

Praedial Servitudes

These occur where the owner of one property (called the *praedium dominans*) has by virtue of his ownership of that property the right to some advantage over the neighbouring property (the *praedium serviens*) of some other person. In the case of these praedial servitudes the servitude is regarded, not as annexed to the person entitled or subject to it, but as annexed to the two properties; e.g. *praedium X* has the right of being supported by *praedium Y*; *A* happens to be the owner for the time being of *X*, and *B* of *Y*, and therefore *A* enjoys and *B* is subject to the servitude. But after they have died or parted with their estates the servitude will go on (for it has *perpetuae causae*, being attached to the *praedia* and not merely

to *A* and *B*) and will be enjoyed or borne by all subsequent owners of the two properties. At civil law there could be no period set to such servitudes and any limitations would be void. However, praetorian law would give effect to a limitation by allowing the dominant owner's remedies to be met by an *exceptio doli* or *pacti conventi*.

The annexation to the land meant that the servitude gave no benefit beyond the needs of the dominant land: sand from one's neighbour's land had to be used on one's own land and could not be sold, nor could water from his fountain. This accommodation really imports the element of vicinity, which is hardly a separate requirement. Thus all praedial servitudes imply that the *praedia* are near each other. Many necessitate adjoining premises (*e.g.* rights of support), but a right of way might benefit one's land even if it is over premises not adjoining and a right to dig sand would be practicable over land at a fair distance.

Praedial servitudes are either rustic or urban. The rustic ones are the older class (although many of them were developed after some of the quite ancient urban ones) and originated as rights that assisted the agricultural and pastoral use of land. The need for urban servitudes arose when buildings were being regularly erected close to each other. Each class remained predominant in its area of origin, country or town, but rustic servitudes, such as those of way and water, could exist in towns, and urban ones, such as light and support, might apply in the country. Even the Romans were puzzled by this and some texts make the distinction depend purely on the locality, not on the nature of the rights, but they can be discounted.

Examples of rustic praedial servitudes are —

(a) *Iter*, the right a man may have of passing on foot or horseback over another's land. It was one only of passage: there was no right to stroll at will on another's land as there is in English law.

(b) *Actus*, the right of driving beasts, with or without carts or other light vehicles.

(c) *Via*, which includes the two former and authorises the use of the road for all purposes (provided that no injury, *e.g.* to trees, be done); even for dragging heavy vehicles along it,

which the person having the *ius actus* could not do. Further, the person who enjoyed *ius viae* could, in the absence of express agreement, insist upon having the road of the width provided by the Twelve Tables, *viz.* eight feet on the straight and sixteen feet where it turned and changed its direction.

(d) *Aquaeductus*, the right of conducting water through the land of another.

(e) *Aquaehaustus*, of drawing water from another's land.

(f) *Pecoris ad aquam appulsus*, the right of watering cattle on another's land.

(g) *Pascendi*, of letting cattle feed on another's land.

(h) *Calcis coquendae*, of burning lime, and

(i) *Harenae fodiendae*, of digging sand.

Examples of urban servitudes are —

(a) *Oneris ferendi*, the right of support.

(b) *Tigni immittendi*, the right to insert a beam into a neighbour's wall.

(c) *Stillicidii avertendi*, the right to have your rain-water drip or flow on to your neighbour's land.

(d) *Altius non tollendi, ne luminibus officiatur, ne prospectui officiatur* form a group giving rights of light and view. The two latter ones will normally be included in the former, which is concerned with the common case of building, but they also apply to trees and other natural obstructions. The right to a view was not accepted by the English law of easements.

(e) *Cloacae immittendae*, the right to lay and keep one's drain on a neighbour's land.

Justinian's texts mention three strange rights: *altius tollendi* (to build higher, also mentioned in Gaius), *stillicidii non recipiendi* (not to receive rain-water) and *luminibus officiendi* (to obstruct light). They are hardly real servitudes because their effect is just to enable a *dominus* to exercise certain freedoms over his own land that one would expect in a normal unrestricted *dominus*. They have been termed counter-servitudes, although the texts give little hint that they are in any way different from the orthodox urban servitudes. It has been suggested that they are exemptions from known public building regulations, that they are means of cancelling opposing servitudes of light, stillicide and view, and that they are partial exemptions from such servitudes. This last is the most

convincing: the first would hardly give rise to private law rights among servitudes, whilst the second seems to have no advantage over the methods of releasing servitudes. Perhaps the answer lies in cases of what we would call building estates, where the servitudes would be imposed on all buildings reciprocally at the start but it was open for each owner to grant a partial or total exemption to his neighbour from any of those servitudes. Though theoretically not servitudes they could in such circumstances be easily classed with them.

Personal Servitudes

Of these there were four under Justinian. The first was usufruct: it arose under the Republic but later than the praedial ones, and from it were developed the other three. All were personal to the grantee, ended on his death and were unassignable. Basically they were family interests rather than commercial, and it was by use of them that the Romans came nearest to the settlement and provided for dependants. It is noteworthy that they began as legacies in wills and throughout their history they were most commonly created by will.

1. *Ususfructus* is defined as *ius alienis rebus utendi fruendi, salva rerum substantia*, the right of using and enjoying property belonging to another provided the substance of the property remained unimpaired. More exactly, a usufruct was the right granted to a man personally to use and enjoy the property of another which, when the usufruct ended, was to revert intact to the *dominus* or his heir. It might be for a term of years, but even here it was ended by death, and in the case of a corporation (which never dies) Justinian fixed the period at 100 years. A usufruct might be in land or buildings, a slave or beast of burden, and in fact in anything except things which were destroyed by use (*quae ipso usu consumuntur*), the reason, of course, being that it was impossible at the end of the usufruct to restore such things intact (*salva rerum substantia*). But the Senate, early in the Empire, permitted a quasi-usufruct even of things of this kind to be created by will; the *usufructuarius* could not undertake to restore them, but he was made to give security and to undertake (by a *cautio*) that when the usufruct ended he or his heir would restore to the testator's heir the capital value of the things comprised in the usufruct.

The destruction of usufruct by *capitis deminutio*, even

minima before Justinian, was a cause of great inconvenience, but was circumvented by legal ingenuity. One method was to give it in *singulos annos* for every successive year, so that *capitis deminutio* would affect it only for the year in which it occurred. Another method commonly employed was to accompany the gift or grant of the usufruct with a provision for successive gifts if the first terminated by *capitis deminutio*.

Duties of the *usufructuarius*. In all cases the *usufructuarius* was bound to show the same degree of care in relation to the property as a *bonus paterfamilias*; he could not use the property for any purpose other than the agreed one, nor alter the character of the property; if the usufruct was of a house, the *usufructuarius* had to keep it in ordinary repair, if of a flock, to replace any of the flock which chanced to die, out of the young, which otherwise belonged to him; and he was bound to restore the property, whatever it was, unimpaired. These duties were usually secured by a *cautio usufructuaria*, the *cautio* in the case of a quasi-usufruct being limited, as already stated, to an undertaking to restore their value.

Rights of the *usufructuarius*. He was entitled to the occupation, control and enjoyment of the property and, although he could not legally transfer the usufruct to another, he could let or sell the use and enjoyment of it; he would remain personally responsible for the *res* to the *dominus*. He was not liable for accidental loss or damage. If the property in question was a farm he was entitled to its ordinary produce and acquired by *fructuum perceptio* the fruits, in which were included the young of animals, but not the children of a female slave. If the property was a slave the *usufructuarius* was entitled to his services, provided they were the slave's usual work, and, as already pointed out, the *usufructuarius* acquired whatever the slave made by hiring out his services (*ex operis suis*) or by use of the property of the *usufructuarius* (*ex re fructuarii*). Legacies, inheritances and gifts to the slave always accrued to the *dominus*, though in later law an indication of benefit to the usufructuary might enable him to acquire.

Usufruct (like *usus*) could be expressly limited — and quite severely — by the instrument creating it, but otherwise the full rights prevailed. Unlike the other personal servitudes usufruct could be held in common by two or more persons.

2. *Usus* was a lesser right that arose around the end of the

Republic and was modelled on usufruct, of which it was a much restricted version. It implied merely the *usus* or bare enjoyment of the property without the *fructus*, except so much of the produce as sufficed for the needs of the household. The *usuarius* was also distinguished from the *usufructuarius* in that he could not sell or let the enjoyment of the property to another. So if the *usus* were of a house, the *usuarius* might live in it himself with his *familia*, but could not permit another to occupy it in his place. He could, however, take in paying guests. As regards duration and most other rules *usus* was in the same position as usufruct.

3. *Habitatio*. It was at one time doubted whether this and the next personal servitude (*operae servorum*) were to be treated as distinct species of servitudes, but by Justinian's time it was established that they were so distinct. *Habitatio* implied the use of a house, together with the right to let it, and (unlike *usufructus* and *usus*) it was never lost by *capitis deminutio minima* or non-user. It seems to have been capable of creation only by will.

4. *Operae servorum vel animalium* implies that the person who enjoyed the servitude had the right (like a *usuarius*) to the service of a slave or animal, but the differences between this servitude and *usus* are that neither *capitis deminutio minima* nor non-user operated to extinguish the right. Uniquely, it probably survived the death of the grantee, who, as in *habitatio*, would take only under a will.

Creation of Servitudes. Various methods arose in the course of Roman history.

(1) *Cessio in iure*. This was the only direct *iure civili* method *inter vivos* for all servitudes. The terminology was suitably amended from that of the conveyance of a *res corporalis*.

(2) *Mancipatio*. Rustic servitudes, or at least the original four (*iter, actus, via* and *aquaeductus*), were *res Mancipi* and therefore capable of this mode in addition to *cessio in iure*.

(3) *Deductio*. A servitude might also be created at *ius civile* by *deductio*; i.e. A makes *mancipatio* or *cessio in iure* of his land or house to B, and at the same time reserves to himself a servitude in relation to it. There could be no *deductio* in a conveyance by *traditio* until the time of Justinian.

(4) *Testamentum*. This could be by direct legacy or
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fideicommissum or by *deductio* from a gift of the *res* itself. As seen already, this was the common way of creating personal servitudes.

(5) *Adiudicatio*. A servitude might also arise from a partition suit. *A* and *B* are co-owners of two neighbouring houses; the judge awards one to each in severalty, and gives each a right of support against the other.

(6) *Usucapio* was a means of acquiring a servitude till the *lex Scribonia* of the later Republic forbade it. This *usucapio* may have been confined to those quasi-corporeal rustic servitudes that were *res mancipi*. It may also demonstrate how originally the '*usu*' meant merely 'by enjoyment', not the later, technical, 'by possession'. The policy of the *lex* is obvious: in all but early societies short periods for prescription of easements and such rights will soon lead to chaos. The acquisition of a building by *usucapio*, of course, always carried with it any servitudes affecting it.

(7) *Quasi traditio* accompanied by acquiescence in the exercise of a servitude first received praetorian protection and was generally recognised by Justinian. It would be modelled on *traditio longa manu*: the *dominus* of the servient *res* would give his permission and then the acquirer would enter into enjoyment. It was inappropriate to the negative praedial servitudes, which would be informally created by pact and stipulation (*infra*).

(8) Land in the provinces being *res extra commercium*, the old methods of *cessio in iure* and *mancipatio* were obviously incapable of being used to create servitudes therein, and no *peregrinus* could acquire any servitude by a *ius civile* method. To cure these defects a new method of acquiring servitudes arose by pact and stipulation, *i.e.* by agreement of the parties (*pactum*) reinforced by a *stipulatio* for a penalty in case the pact, which was not itself actionable, was disregarded. At first, a servitude so created probably did not, like a true praedial servitude, constitute a *ius in re aliena*; like most rights created by contract, it merely conferred a *ius in personam*, but under praetorian influence it had come, by the time of Gaius, to confer rights *in rem*, for Gaius treats it as undoubtedly creating a servitude in the ordinary sense, at any rate for provincial land. It was followed by a *quasi traditio* in the case of a positive servitude.

(9) *Longi temporis praescriptio*. Uninterrupted exercise of the right for ten years *inter praesentes*, twenty *inter absentes*, was a method, like pacts and stipulations, at first confined to provincial lands, and afterwards extended to Italy and Rome. It probably originated in the provincial edict by analogy with the statutory *praescriptio* of land. However, instead of needing *bona fides* and *iustus titulus*, it was effective if enjoyment was *nec vi, nec clam, nec precario* in the case of praedial servitudes. What rules applied in respect of personal servitudes is uncertain.

In the time of Justinian the difference between *solum Italicum* and *solum provinciale* was abolished, and *cessio in iure* and *mancipatio* had become obsolete methods of conveyance. The ordinary methods, therefore, of creating servitudes were —

(1) By pact and stipulation. (2) By *deductio*, when property was conveyed to another by the then common method, *traditio*. (3) By *quasi traditio*, followed by suffering the exercise of the right. (4) By *longi temporis praescriptio*, the period being the same as formerly. (5) *Testamento*. (6) *Adiudicatione*; and (7) exceptionally, *lege*, e.g. the father's usufruct of half his son's *bona adventitia* after emancipation.

No *transfer* of a servitude to a third person was possible. This has already been pointed out in the case of personal servitudes, but it is equally true of praedial servitudes; they passed, of course, on alienation of the *praedium dominans*, as the liability passed on the transfer of the *praedium serviens*, but never *per se*.

Servitudes end —

1. By *cessio in iure* (or *remancipatio* of a rustic servitude) and in late law by an act of renunciation. The latter began as a ground for an *exceptio*.

2. If the servitude was a personal one, by the death or *capitis deminutio* of the person entitled. *Capitis deminutio minima*, however, never produced this result in the case of *habitatio* and *operae servorum*, and under Justinian it had no effect in the case of any servitude.

3. In the case of a usufruct, by the usufructuary's wantonly abusing his rights.

4. In the case of praedial servitudes, by the permanent destruction of the *praedium dominans*.

5. By destruction of the thing subject to the servitude.

6. By merger. In the case of praedial servitudes it was known as *confusio* and occurred where the owner of one plot acquired the other. In the personal servitudes it was *consolidatio* and was brought about by the holder's acquiring the *dominium* of the *res*.

7. By non-user. *Habitatio* and *operae servorum* were never lost in this way. Under the old law non-user of a thing in usufruct or *in usu* extinguished the right in one year in the case of a movable, two in the case of immovable property. Two years' non-user extinguished praedial servitudes, subject to this, that with regard to *urban* praedial servitudes time did not run until the person subject to the servitude had done some act clearly showing that he treated the servitude as at an end; e.g. raised his house higher than the servitude permitted (*usucapio libertatis*). If the servitudes affected provincial soil the periods were ten and twenty years. These last-mentioned periods were adopted by Justinian for all cases, but in the case of urban servitudes *usucapio libertatis* was still necessary, and a personal servitude of a *res* other than land would presumably be lost by non-user for three years.

Protection of Servitudes

There were a host of remedies for the many different servitudes and they arose at various times. The chief proprietary remedy was a form of the *vindicatio*, called an *actio confessoria* by Justinian. However, there was also, unique in the law of property, an *actio negatoria* for the owner of the servient *res* to disprove the servitude. This was very important, especially in respect of praedial servitudes, because the praetor gave interdicts to the enjoyers of apparent servitudes just as he gave others to possessors whether with or without *dominium*. The interdicts were almost as various as the servitudes — e.g. *quem usufructum*, *de itinere*, *de aqua*. As already seen *exceptiones doli* and *pacti* were also most important, and there may well have been several specific *exceptiones* for special circumstances.

(B) *Emphyteusis*

This Greek word is deceptively used to indicate an essentially Roman institution which in late law did undergo some

influence from similar Eastern institutions and thus achieved its name. It began with the perpetual and long-term leases of State and city lands (*agri vectigales*) to farmers, the rent being generally in kind. Gaius, in dealing with the contracts of sale (*emptio-venditio*) and hire (*locatio-conductio*), remarks that they have so much in common that it is sometimes difficult to see the distinction between them; as, *e.g.*, when land is hired in perpetuity, on condition that so long as the rent is paid the lease is to continue; and Gaius adds that the better opinion is that the contract is one of hire. This seems to indicate that the lease was then merely a contractual right, and as yet had no *actio in rem* to support it. However, it almost certainly had the full battery of praetorian interdicts and fictions by that time, and it might well have been a virtual right in *rem* during the classical period. Later, in the Eastern Empire, the institution came to be adopted in imperial grants of virgin land, and by the fifth century it was being granted by private persons. By this time it was a clear right in *rem* and a constitution of Zeno reversed the opinion of Gaius and classed it as neither sale nor hire, but as a transaction *ipso iure*.

The grantor or landlord retained the *dominium* of the property; this gave him the right to receive the rent from the tenant, and in certain events to forfeit the lease (*e.g.* if the rent were unpaid for three years). The tenant (*emphyteuta*) could only assign with consent, and the landlord in such a case had the right of pre-emption; *i.e.* he had the right to buy the land from the tenant at the price he was prepared to sell it to the third person. If he did not choose to buy out the tenant, he was entitled to a fine of two per cent of the price. Assignment would normally be by simple *traditio*. The *emphyteuta* became entitled to the profits of the land by *fructuum separatio*; he could mortgage the land, and create servitudes over it and his rights passed to his heir or legatee.

(C) *Superficies*

Superficies, which owes its origin to the praetor, stands to houses as *emphyteusis* to agricultural land and represents the Roman long lease (either in perpetuity or for a long term) of land for building purposes. It too began with grants by the State and *municipia*, and its first protection was the *interdictum*

de superficie. It may not have been granted by private persons till after the classical period. The lessee built the house, which thereupon (since *superficies solo cedit*) became the lessor's property. But the lessee acquired rights *in rem* to the extent of his interest, and in return for the use of the land and house he paid a rent.

V

Real Security

Real security is the institution whereby the performance of an obligation, especially the payment of a debt, is enforceable not just by an action *in personam* against the obligee or debtor but also by remedies *in rem* against specified property of his. It is of greatest importance where the debtor becomes insolvent and the creditor would have to share with other creditors in the general assets of the debtor if he had not a right to be paid in priority to them out of, and to the extent of, the property specified. It is contrasted with personal security, where the creditor guards against his debtor's default and insolvency by having a trustworthy third party guaranteeing that he will pay if the debtor does not.

The earliest Roman form, the *fiducia cum creditore*, bears a great likeness to the old English mortgage of real property, where the debtor, by a feoffment (or symbolical delivery of the land), made the creditor owner of it, subject to a covenant that he would reconvey, *i.e.* make a refeoffment to the debtor if he repaid the money lent (principal) and interest on a day named.

At Rome a mortgage of *res Mancipi*, whether movable or immovable, was originally effected by the borrower's conveying to the lender (*fiduciarius*) the property which was to secure the debt, by *cessio in iure* or *mancipatio*, so as to make the lender *dominus*. The lender then undertook by a *fiducia* to make reconveyance when principal and interest were repaid. Since he was *dominus* the lender could at law realise his security (*i.e.* sell it), pay himself out of the proceeds and hand over the balance (if any) to the borrower; but the free exercise of this power was impeded by the *fiducia*, which bound him, on repayment, to give the debtor his property back; he might

legally sell, but if the debtor suffered damage thereby he could compel the creditor by the *actio fiduciae* (condemnation in which carried *infamia*) to make compensation. It follows that the debtor's right of redemption (*i.e.* getting his property back on repayment of everything due) was not limited in point of time, and this and the fact that *fiducia* applied to movable as well as immovable property, are the chief differences between the Roman institution and the old English mortgage, which only applied to freehold property in land and in which, if the day named for repayment passed, the land originally became the absolute property of the creditor (mortgagee). A similar effect with respect to redemption, however, could probably be produced at Rome by special agreement providing that the *fiducia* was to become void in default of payment at an agreed date. (Such a clause was found in the later institution, *pignus*, and was called *lex commissaria*, and it is quite likely to have existed first in *fiducia* where it would have operated merely to extinguish the obligation, not, as in *pignus*, to transfer ownership to the pledgee.) It is obvious that in this form of security the mortgagee acquired rights of wide extent; he became, in fact, more than a person with a *ius in re aliena*, for he was *dominus*, save so far as the *fiducia* limited his ownership. But in spite of the one clear advantage, that the debtor could not deal with his property to the detriment of the lender (*e.g.* by fraudulently creating a second or third mortgage), there were many defects attaching to *fiducia* as a form of security. Since it was carried out by means of the civil law conveyances it had no application to *peregrini* or to land in the provinces; further, *fiducia*, at any rate at law, placed the debtor very much at his creditor's mercy, for although he could get compensation under the *fiducia* from the creditor who, *e.g.*, unfairly sold, he could not 'follow the property', *i.e.* get it back from a third person who had bought it; and in strict law, even if he remained in possession of the property as he might well do in the case of land, he became, at best, from the moment of conveyance tenant at will (*precario tenens*) to his creditor. Whilst it could be created by *cessio in iure*, *mancipatio* would be the normal case and so *fiducia* may well have applied only to *res Mancipi*.

All in all, it was a most interesting institution. Although it was in substance contractual and could easily have been classed as a real contract, it never seems to have been so

regarded by the Romans. This was probably because it antedated notions of contract and was only created in association with a formal conveyance. (Yet *mutuum*, also ancient and always involving a conveyance of a *res*, became classed as a contract, so that if there is any logical distinction it seems to be in the formal nature of *mancipatio* and *cessio in iure* as opposed to the *traditio* involved in *mutuum*.) *Fiducia* was popular and lasted through the classical period and only died out with the conveyances to which it was annexed: by that time it had probably become confined in practice to mortgages of land. It therefore coexisted a long time with *pignus*, which developed in the late Republic under the care of the praetor and appears to have derived many of its rules from *fiducia*. The other type of *fiducia*, *cum amico*, gave way much more quickly to the praetorian-developed contracts of *depositum* and *commodatum*. *Fiducia cum creditore* lasted, no doubt, because the creditor has the bigger say in the arrangements for security and he would regard this as the safest and most advantageous for himself.

The next form of mortgage was *pignus*, a real contract. Here the borrower made *traditio* of the thing pledged, and the creditor acquired, not, as before, *dominium*, but possession of the object in question, such possession being protected by interdicts provided by the praetor. *Pignus* was thus less formal and cumbrous than *fiducia*, could be created in the simplest way and would not be restricted to *res Mancipi* as *fiducia* probably was. It was clearly more to the advantage of the debtor, for he retained *dominium* and thus was not liable to have the *res* validly sold in breach of agreement as in *fiducia*. The creditor would be happy enough with the effective possessory remedies even though he lost the proprietary ones, but the basic contract of *pignus*, unless supported by special agreement, was not very favourable to him. He would not be able to use or enjoy the property if it were movable without being liable for theft, and he had no general right of sale. It was therefore sometimes specially agreed that the lender might take the fruits and profits by way of interest (*antichresis*). Also, it was often provided that the creditor might sell the *res* to obtain payment of his debt. Under this power he could not sell to himself nor to a nominee for himself: to do this he would have to induce the debtor to sell to him for a price equal to the

excess over the debt. When he did sell, he could take his principal and interest (and costs, no doubt) from the price but had to pay the rest to the debtor. In the time of Gaius the power would be frequent, but apparently it was not yet implied in any contract. However, before the end of the classical period it was implied unless expressly excluded. When he did sell, he could transfer only by *traditio*, not by a *iure civili* method, and so could confer only bonitary ownership of a *res Mancipi*. Besides the power of sale there could be a special clause, the *lex commissoria*, that the *res* was to become the creditor's if the loan was not punctually repaid, a sort of automatic foreclosure. It would most probably have operated as a *traditio brevi manu*, and *usucapio* would then have been necessary for a *res Mancipi*. This was considered as oppressive in the classical period and it became normal to apply to the court for a praetorian order to effect foreclosure until Constantine declared the *lex commissoria* utterly void.

As *pignus* itself involved a transfer of *possessio* it would be limited generally to *res corporales*, though at least in later law usufruct, *emphyteusis* and *superficies* might be pledged. However, pledges of such *iura*, and also even of debts and other pledges, would be effected by the development from *pignus*, known as *hypotheca* and not involving *possessio*. *Pignus* would normally involve the keeping of control (as well as legal *possessio*) of the *res* by the lender, although the debtor might be allowed to hold *precario* in some cases, but probably only in respect of land. Even so it would be possible to create only one mortgage on one *res*, and *pignus* was normally confined to the case of pawning of other pledging of movables, the debtor being denied their use till repayment.

The need for a genuine legal charge, *i.e.* a right *in rem* against the mortgaged property without the passing of either ownership or possession, must have been felt quite early. The debtor might be prepared to part with possession of a ring or a suit of clothes, but he could not be expected to hand over his house or his farm or tools that were his means of livelihood. Yet these might be the only substantial *res* for him to pledge. If the creditor could be sure of being able to take possession immediately he needed to enforce or safeguard his security, and to take it even from a third party who had come by it, then both sides could be accommodated. Such an institution

arose from a very special beginning rather than from the practice of letting the debtor hold *precario* (the creditor under *pignus* having the interdict *de precario* against him, but perhaps no remedy against third parties).

Under the Republic a *conductor* of land (later the *colonus*) might agree in his lease that the *locator* should be able to seize the tenant's movables (*invecta et illata*) that he found on the premises, including crops on a farm, as security for payment of rent due. The praetor gave the landlord a special interdict, called the *Salvianum* (after the creator?), to get possession of them, and later an *actio Serviana* gave him a right *in rem* which was enforceable against third parties, including purchasers from the debtor. This action was *in factum* and enabled the creditor to follow the *res* into the hands of another and so to achieve the compensation he might not get from his debtor. In the exceptional case where the landlord had possession and the third party was suing out a *vindicatio* on a title from the debtor, the praetor would obviously furnish the landlord with a corresponding *exceptio*. Later still, the interdict as well as the action became available against third parties, so that the landlord now had cast-iron security without having to take possession or ownership before he need. It was indeed a full and genuine charge, a *ius in rem* by virtue of the praetorian law. Moreover, it was a floating charge: it was not just a charge on the goods on the premises when the agreement was made; it applied against the goods that were there from time to time so that it would cease to attach to tools when they wore out or were sold and to crops or stock when sold but would attach to their replacements and new stock. In such a way the objects which the landlord took in execution might not be those originally charged.

This first charge was achieved because of its practicality and convenience. It was, however, very limited: it was probably only of full effect in the case of the agricultural tenant. In the early Empire it was extended to cover the urban tenant fully, and by Hadrian's time it applied to any case where the parties agreed that the debtor's goods should be subject to such a charge. The means of extension were an *actio Serviana utilis*, or *quasi Serviana*, and an *interdictum quasi Salvianum*, but these names may have been invented much later. So there was a full charge of general application and of Roman

origin in the classical period. Later it became identified with a Greek form of mortgage, the *hypotheca*, and the final name of the *actio quasi Serviana* was *actio hypothecaria*.

Hypotheca (to use the later name to describe the institution before it received any name at all) became very popular and was almost universally used instead of *pignus* in charges on land. It was also employed to effect mortgages of *iura* and *obligationes*. It had the further great advantage that the debtor could make more than one charge on one *res* or collection of *res*. Besides rules to penalise frauds by the still-possessing debtor, there grew up rules to settle priorities. The basic rule was that first in time prevailed so that date of creation alone mattered: even a pledgee who was given possession was postponed to a creditor with a prior hypothec. In late law the Emperor Leo gave priority to registered and to formally executed hypothecs. The later mortgagee could not exercise his power of sale so as to free the *res* of a prior one's charge without his consent. Thus if *A*, *B* and *C* had hypothecs over a *res*, *B* would have an implied power of sale (as would *A* and *C*), but if he did sell to *D*, *A* could recover his security from *D* by the *actio hypothecaria*, whilst *C* was left only with a right *in personam* against *B* to be paid his debt out of the excess of the price over *B*'s debts (and, of course, with his original personal action against the debtor).

Despite all these special rules as to *hypotheca*, it and *pignus* were fundamentally the same institution. The contract upon which their interests rested was *pignus* and the actions to enforce that contract and its terms were the *actio pigneratitia directa* for the debtor and the *contraria* for the creditor. These actions may have begun *in factum*, but were *bonae fidei iudicia* before the end of the classical period. The *bonae fidei* character of the contract resulted in the party in possession being liable for *dolus* and *culpa levis* (i.e. roughly, for intentional and negligent harm), and perhaps even for *custodia*, which in classical times meant having to compensate for most accidental harm to the *res*. The creditor had also to exercise his power of sale *bona fide* and hand over any excess in price to the other chargees and the debtor. On payment of the debt a hypothec would automatically cease and the pledgee under *pignus* would be bound to restore the *res*. The pledgor had to pay all reasonable expenses incurred on the *res* and compensate

for damage done by it or for lack of title in the *res* affecting the pledgee.

Under Justinian's law the rules as to power of sale were very complicated, and whilst sale could never now be totally excluded in the contract there were many safeguards for the debtor. If the power of sale was not given in the contract, three notices had to be given or judgment obtained and then two years had to elapse before sale. If no purchaser could be found and the debt remained unpaid a court order could be had vesting the *res* in the creditor, but the debtor was still able to redeem by paying the debt and all costs within two years. This was, of course, a reintroduction of foreclosure, but, as it operated only in the last resort and was surrounded by safeguards, it had none of its ancient terrors.

Hypotheca became increasingly popular as time went on and the law came to use it as a means of effecting policies. Thus besides privately created charges there came tacit (legal) hypothecs and these would often be privileged. A wife had such an implied hypothec over the *dos* (which was technically her husband's property) and Justinian made this hypothec privileged so that it took priority even over other hypothecs of it. Complete havoc was caused by the increasing imposition of general hypothecs — *i.e.* charges over all the property of the debtor or other obligee, as in the case of the tutor's property being liable to his ward's charge. When such a general hypothec was privileged even over prior special hypothecs the situation must have been chaotic; *e.g.* when Justinian put such a hypothec on all a husband's property as security for return of the wife's *dos* it must have made traders very cautious about dealing with married men. Another such hypothec was that of the *Fiscus* for taxes owed.

VI

Capacity and Representation in the Law of Property

(A) Capacity to Acquire

In general anyone could acquire both ownership and possession by his own act. However, there were several exceptions.

An *infans* and a *furiosus* could not acquire by any act that involved intention: property could come to them otherwise, e.g. as *sui heredes* or by *accessio*, and within limits they could acquire through a slave owned by them and this was the normal method of transferring property to them. A dumb man was incapable of acquiring by *mancipatio* or any other means involving speech, but again his slave could be used. One spouse could not normally acquire from the other by gift (*ante*, p. 103). An *impubes* could acquire without *auctoritas*, except where, as with an inheritance, the ownership might involve liabilities, however slight. That *peregrini* could not acquire by *iure civili* methods, and that slaves (and *filiifamiliarum* before their various privileges were conferred) could not acquire for themselves have already been noted.

(B) Acquisition through Others

In the case of persons in power, such as the slave or the *filiusfamilias*, all acquisitions went to the *dominus* or *paterfamilias*, subject to the rules about the son's *peculia* and *bona adventitia* (*ante*, p. 124). Wives *in manu* and persons *in mancipii causa* were in the same position. This acquisition was not really an instance of agency or representation, rather it was a sort of *accessio*. All of them could acquire by *mancipatio* (there was a variation of the *formula* for the case) as well as by the *iure gentium* modes. They probably could not use *cessio in iure*, however, because they had not the capacity to appear before the court in a *legis actio*. A slave owned in common would acquire for each of his masters proportionately to their interest in him unless one of them was designated in the transfer. A slave in usufruct acquired for the usufructuary in two cases, by hiring out his labours, and by employment of the property of the usufructuary; in other cases the acquisition was for the *dominus*. Tutors, and curators of *furiosi* and perhaps of *prodigi*, could acquire for their wards by *traditio*, it seems, and also obtain *bonorum possessio* but not accept an inheritance *iure civili* for them until late law. But the case of the *extraneus* needs special attention.

Originally, neither ownership nor possession could be acquired through *extraneae personae*. So if I commissioned B, a person not in power, to buy a plough for me, when he

bought it it was his ; he had to make a second *traditio* to me before I could become owner. If he sold it to someone else instead, I could not claim it, though I had a remedy against my agent on the contract (*mandatum*) between us. Quite early on it was established that if the *extraneus* was acting merely as a *nuntius*, i.e. in a purely ministerial capacity without having to exercise any discretion, I acquired. Thus if I engaged *B* to collect a plough I had already agreed to buy from *A*, then *A*'s delivery of it to *B* would be a *traditio* to me. *B* played little more part than my dog would if it fetched my evening paper from a shop. If *B* had to negotiate with *A* in the slightest degree he would be more than a *nuntius*, and then the rule that contracts could not be made through agents would prevent the transaction's being directly for my benefit and therefore stop passing of ownership to me under it. After much hesitation the commercial inconvenience of the rule brought about a change. Gaius still expresses the general rule that possession could not be acquired through an *extraneus* (other than a *nuntius*, presumably), but he seems to favour an exception in the one case of the general agent, the *procurator*. Once such an agent could acquire possession for his principal, acquisition of ownership by *traditio* would naturally and speedily follow. Probably before the end of the classical period a special agent under a mandate for a particular transaction could acquire both possession and ownership for his principal, and, when the notion was established that a mandate could be created *after* the transaction by ratification, there was little of the old rule left. However, it was always clear that no *extraneus* could effect a *iure civili* acquisition for his principal. There was nothing, however, to stop the principal's usucaping what had been delivered by *traditio* to his agent provided the necessary mental elements were present.

(C) Capacity to Alienate

1. Owners who could not Alienate

Usually the right of alienation is an integral part of ownership, but considerations of public policy may dictate restrictions. Thus a *pupillus* could not alienate without the *auctoritas* of the tutor ; this was also necessary with respect to *res Mancipi* in the case of a woman *in perpetua tutela*. *Furiosi* and

infantes were incapable of alienating. It is uncertain whether *prodigi* were under the same rule or could alienate with the consent of their curators. The husband who owned dotal land was under increasing disabilities with respect to it during the Empire. Alienation of a *res* which was the subject of litigation (*litigiosa*) might give rise to a *restitutio in integrum*.

It was not possible to render land inalienable by a clause in a conveyance: a breach of such a term could at most give rise to an action in contract. However, clauses in wills could impose some restrictions, and Justinian may have provided that contracts could actually invalidate alienations which infringed the terms agreed.

2. Non-owners who could Alienate

Tutors and curators under the circumstances already noted (generally only by *traditio*, but a *curator furiosi* could use *iure civili* methods also); persons in power duly authorised to make an alienation, but with certain restrictions as to the method to be employed, *e.g.* not by *cessio in iure*; the *creditor pignoris* (pledgee), at first by express agreement, later the power being implied. The most important case was where an *extranea persona* authorised by mandate effected the sale. This was first possible only where the *extraneus* was a *nuntius* and his acts purely ministerial, but, by the time of Gaius, the *procurator*, who had a general and not merely specific authority, could effect the alienation and give title. Later, perhaps in classical times, the holder of a specific mandate became competent to alienate, but the discretion would usually be more restricted than in the converse case of acquisition, power being given only when the transaction in mind was already fairly definite.

VII

Co-ownership

It was possible at all times for *dominium* to be vested contemporaneously in more than one person. In the developed law this would happen most frequently under a consensual contract of partnership, *societas*. In such a case the rights of the parties would be primarily decided by the terms of the contract

and would be enforceable by the *actio pro socio*. However, it could arise otherwise, *e.g.* by a joint legacy or inheritance. Ownership did not in any case have to be in equal shares. Thus one heir could own a half-share, the other half being divided amongst his co-heirs, and partners would normally hold proportionately to what they had put into the purchase. However, if there was no special arrangement, equality of interests was the rule. Each owner could do as he desired with his own part, sell it, mortgage it, give it away. However, no action, unless unanimous, could be taken in respect of the *res* itself: majority decision was not recognised. Thus to sell it or to make or accept a servitude all must consent. Until Justinian manumission by one owner of a *communis servus* operated only to vest his share in the others (*ius accrescendi*), but under Justinian it freed the slave whilst putting an obligation on the manumissor to compensate the others.

In classical law, injuries to the property and infringements of rights of other co-owners seem only to have been remediable if and when an action was brought to divide the property. This action was the *actio communi dividundo* in all cases except that of *coheredes*, where it was *familiae erciscundae*. Under these partition actions the *iudex* had wide powers of *adiudicatio* and could order money payments to adjust any division made. Where usufruct, *emphyteusis* or *pignus* was held in common the action was *utilis*. Under Justinian the actions could be brought for breaches of duty without necessitating partition. The position was then very similar to the case where there was a *societas* and the *actio pro socio* was available.

PART FOUR

THE LAW OF UNIVERSAL
SUCCESSION

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PART FOUR

THE LAW OF UNIVERSAL SUCCESSION

UNIVERSAL, as opposed to singular, succession means that one acquires, not a single *res*, whether *corporeal* (as a slave) or *incorporeal* (as a servitude), but an aggregate of rights and liabilities called a *iuris universitas*. The universal successor assumes the whole of the legal clothing of the person to whom he succeeds; steps, as it were, into his shoes. He takes over his rights and liabilities of every kind; his property (*res singulae*) and *iura in re aliena*, the debts and other obligations (such as rights of action for damages for breach of contract) owing to him, and the debts and obligations which he owes. All these make up the *iuris universitas* (which is viewed as an abstract legal thing, a *res incorporalis*) which will pass to the successor, save that some few rights (*e.g.* usufruct) and obligations (*e.g.* liability for delict) may be so personal to the individual concerned that they become extinguished altogether.

This may be taken as the general picture of the institution in the time of Justinian and perhaps even that of the later classical jurists. In Gaius' time the *effect* of the succession was already very much as stated, but it is possible that *theory* had not yet reached that stage. *Successio* may then still have been thought of as the general acquisition of things and assets, whilst debts owed to the predecessor and liabilities incurred by him would be regarded as merely consequential advantages and burdens attaching to the *res*. Originally indeed, it was very likely that the *iura in personam*, both for and against the predecessor, evaporated on his death or *capitis deminutio* and only the *res* passed. However, the beginnings and development of the notion and its terminology are just one of the many points of controversy on the historical side of the whole subject.

Gaius tells us that universal succession takes place if a person has become heir to anyone (which may be under a will or on an intestacy), or if he has obtained a grant of *bonorum possessio*, or has bought the estate of an insolvent (*bonorum emptio*), or has taken anybody in adrogation, or married a woman by a mode by which she passed *in manum*. As a matter of fact the *universitas iuris* passed whether the woman were married really, or merely fictitiously by a *coemptio fiduciae causa*. There was also another kind of universal succession in the time of Gaius — *cessio in iure hereditatis*.

Finally, as Justinian points out, a new kind of *successio per universitatem* was introduced by Marcus Aurelius — *addictio bonorum libertatis causa*; and Justinian also notices as obsolete the ancient form under the *S.C. Claudianum*.

It is true to say, however, that the classic case of universal succession is that under the *ius civile* on death. All the others seem to have been developed, even if not originated, by analogy to *hereditas*, and very often the consequences are not as full as in inheritance. Thus in *adrogatio* and *manus* the civil law conception seems to have been one whereunder the property and rights of the *adrogatus* and the wife vested in the *paterfamilias* more as if *potestas* was deemed to have existed when the rights were originally created than by any *successio*. Whereas in *hereditas* liability for debts passed to the *heres* unlimited by the amount of the deceased's assets, liability in these two cases did not exist at all at *ius civile*, and when the praetor eventually allowed a remedy it was strictly limited to the assets. In *bonorum emptio* the 'liquidator' admittedly obtained, with praetorian aid, all the property and rights of action of the insolvent, but again the assets set the limit to the liability. Moreover, in this case, the insolvent's liability for the unsatisfied debts or portions of debts still remained after the alleged *successio*. Indeed, one may fairly claim that only *hereditas* and the praetorian system of inheritance by *bonorum possessio*, modelled on *hereditas*, are completely true cases of universal succession.

The forms of universal succession will be considered in the following order :

- I. Testate succession.
- II. Intestate succession.
- III. *Bonorum possessio*.

IV. *Addictio bonorum libertatis causa.*

V. *Cessio in iure hereditatis.*

VI. (a) Bankruptcy.

(b) Adrogation, marriage and coemption.

(c) The *S.C. Claudianum*.

I

Testate Succession

It is necessary to consider under this head —

A. 1. How wills were made. 2. What was a codicil.

B. The contents of wills, and rules to be observed in drawing them up.

C. Who could make, witness or take benefits under them — *testamenti factio*.

D. How a will might be or become invalid.

(A) Testamentary Instruments

1. How a Will was Made

The early history of succession upon death in Roman law is extremely obscure and has been the field of much speculation and controversy. Probably intestate succession preceded will-making, but this is hotly disputed. Various theories as to the origin of the will have been put forward; *e.g.* that wills originated in the choice of chieftains for families or in other political notions; that the institution of the heir was originally an adrogation by the testator who had no children of his own; that the will was at first only a legacy-making instrument. All these differing theories take account of what evidence we have, but that is so small that very little can really be asserted with confidence.

However, certain features are reasonably clear. By historical times the will was concerned with the passing of property rather than political or family power. The central function of the will was the institution of the *heres* (or *heredes*) and the *heres* it was that took upon himself all the assets and liabilities. This *heres* was primarily the son or other descendant of the

testator, one who became *sui iuris* on the testator's death. The system was unique in the ancient world, at least in those communities that developed. It was paralleled by the law of intestate succession, which was solely concerned with the designation of the *heres*. In the will all other provisions (e.g. manumissions, legacies, appointments of guardians) were entirely secondary to the *institutio*.

The power of the *paterfamilias* and his great freedom of testation seems to have induced an almost universal practice of will-making among the Romans. Perhaps it was a moral duty based on *pietas* to see that family property went to those thought most worthy of using it. There is no real evidence that dying intestate was regarded as definitely disgraceful, though it seems clear that dying insolvent was so regarded. Possibly many of the cases of intestacy arose because of the nullity or the failure of an attempted will rather than from complete omission to make a will at all. Finally, there is clear evidence of the importance of religion in the early history. It is reasonable to believe that the *heres* originally had the duty of tending the family *sacra* and that the will would therefore be of great concern to the pontiffs. Certainly these priests met the gradual expansion in testators' freedom over their property by imposing the rule that *sacra* followed the bulk of the assets.

It is not surprising that the first will of which we have knowledge is that made in the *comitia calata*, which was the *comitia curiata* meeting in religious form under the presidency of the *pontifex maximus* and which probably also dealt with adrogations. The *comitia* met only twice a year, in March and May, so that the opportunities for testation were restricted. Whether the procedure involved a *lex* with a vote by the *populus* or was just a solemn calling of the *populus* to witness is uncertain. It most probably began as a means of providing *heredes* where there were no descendants who would count as *sui heredes*, but it must soon have become a method of varying the inheritance of those *sui*. Unlike *adrogatio*, the will in *comitiis calatis* died out quite early in the Republic, and while it is likely that many of the rules in the will *per aes et libram* were adopted or developed from it, so little is known that the scholar is left to intelligent guess-work.

Another ancient form also existed and probably lasted a little longer. This was the will in *procinctu*. It was apparently

just a declaration of desire as to the destination of his property made by a *civis* to his assembled comrades before a battle, not a *lex* passed by the *populus* in the military formation of the *comitia centuriata*. Again, little further is known, not even whether it had the same effect as the will in *comitiis calatis*. It was obsolete before the end of the Republic, but it may have influenced the form and rules of the privileged military will of later times.

In the course of the Republic a third kind of will was evolved, probably by the plebeians (who could not perhaps appear in *comitiis calatis*), and this was the ordinary form for all when Gaius wrote. Like a will in its modern conception, it became *secret* and *revocable*: it was the will *per aes et libram*, the will made by means of a mancipation or fictitious sale.

In its earliest form, the proceedings were as follows: *A*, being about to die, sold for a nominal price his *familia* (i.e. all his property, in this context) to *B*, the *familiae emptor*, and charged *B* to carry out his last wishes, which he orally communicated, e.g. with regard to legacies. (These oral directions were known as the nuncupative part of the will.) In this stage, of course, the will was neither secret nor revocable—and it perhaps operated, not on *A*'s death (like a modern will), but at once. By a sale *inter vivos* *B* would have bought *A*'s *hereditas*, and *A*, if he recovered, might be dependent upon *B* (unless there was some *fiducia* to allow *A* the enjoyment of his property during his lifetime). Whether the sale originally operated immediately or its effect was always postponed until death, there was a time while the will was still public and possibly irrevocable when it did not operate till *A*'s death. Long before the time of Gaius a great change had taken place in the mancipatory will: the *familiae emptor* was no longer virtually heir, but a mere figure to enable the mancipation to be carried out; the real heir, upon whom the legacies were charged, was the person named by the testator, either orally in the *nuncupatio*, or, as was nearly always the case, in the written will. Accordingly, by classical times, the will *per aes et libram* might be secret; it could be revoked, and it did not operate until death.

The actual proceedings, as may be gathered from Gaius, were normally as follows—first, the testator had his will drawn up on tablets, often by a skilled lawyer, and in it the

heres was instituted, legacies bequeathed and the other customary directions given. In order to make the will effective, *i.e.* to make it a *legal* will, the whole ceremony of a *mancipation* had to be solemnly performed. Accordingly, the tablets having been prepared, the testator, *A*, had to assemble five Roman citizens above puberty as witnesses, a *libripens*, and some friend, *C*, to act as *familiae emptor*. *A* then, *pro forma*, *mancipated* his estate (*familia*) to *C*. *C*, holding a piece of bronze in his hand, said to *A*, in effect: 'Let your *familia* and *pecunia* be mine (but only as a guardian and custodian) by purchase with this piece of bronze and these bronze scales, so that you may lawfully be able to make your will according to the statute'. (The reference is to some provision of the Twelve Tables, one that probably confirmed, or even conferred, full freedom of testation; such a provision is more likely to have been in respect of the comitial will, since the *mancipatory* will was probably later than the Tables.) *C* then struck the scales with the bronze which, as forming the nominal purchase money, he handed to *A*, and the *mancipatio familiae* — the fictitious sale of *A*'s estate — was at an end. All that remained was the *nuncupatio*, *i.e.* the public declaration of the purposes for which *C* held the property as custodian. *A*, therefore, holding in his hand the tablets upon which the will was written, declared: 'According as it is written in these tablets, so do I give and bequeath, and so do you, Quirites, bear witness'. The business was then complete and *C* had no further part to play, although he might later be called to witness, along with the five and the *libripens*, that the ritual had been duly performed. When *A* died, the will, unless he had duly revoked it or altered it, was produced and opened, and the heir named in it became *A*'s legal heir. If *A* did wish to revoke or alter the will, it seems that the whole proceedings had to be gone through again, although it has been held that only a fresh *nuncupatio* was necessary, not the *mancipatio* as well.

The ceremony has several points of interest. In the first place, *C*'s words are markedly different from those in the normal *mancipatio*: there is no assertion of Quiritary ownership and his whole interest is subjected to *A*'s wishes. It is thus an adaptation of *mancipatio* that assumes a completely independent character from the conveyance, just like marriage by *coemptio*. Then again, the word '*familia*', which to Gaius

meant '*patrimonium*' and could be equated to '*hereditas*', must originally have had 'household' as its primary meaning, and it may well show a relationship between chieftainship and early will-making.

The so-called Praetorian will. Two facts strike one about the will *per aes et libram*. First, the form is extremely technical and cumbrous. Every system of law requires a will to be executed with some sort of formality as a proof, not merely that the testator is serious, but that the document really is his will, and this is the essence of the transaction. But any reasonable man would be satisfied in these particulars by a form involving far less detail than that required in the classical law. Secondly, in spite of the many formalities involved in the will *per aes et libram*, there was nothing to identify the will, when ultimately produced, with the tablets which the testator had for a brief moment held in his hand at the sale. To meet this second objection the practice seems to have grown up for the five witnesses, the *libripens* and the *familiae emptor* (i.e. seven persons altogether) to seal up the will with their seals, which, of course, identified the document beyond doubt. The first objection (the unnecessary formalities) was not met by the civil law till long after the classical period. Until the Byzantine Emperors, the Roman citizen had only this one method of will-making — *per aes et libram*. As long as *mancipatio* itself lasted as a conveyance the conservative Romans would see no reason why the like formality should not be kept in the solemn institution of testation, and there is no reason to doubt that the forms were regularly observed in Italy till well after Gaius' time. Even so, however, the position had for a long time been affected by praetorian intervention.

When the urban praetor became emancipated from the strict *legis actio* system he paid great attention to the law of succession. The *iure civili* remedies for the *heres*, the *hereditatis petitio* and the *vindicatio*, were cumbrous and slow and needed full proof of his title, whether by a valid will or upon an intestacy. Primarily by use of his executive powers, the praetor provided a much speedier and easier system of remedies which revolutionised the law of succession and which are known collectively under the name of *bonorum possessio*, the workings of which will be discussed later. *Bonorum possessio*

must have been immediately attractive to any *heres*, testamentary or *ab intestato*, and it would be to the *heres* as designated by the *ius civile* that the grant of *bonorum possessio* was most regularly given. Only with special policies in mind and with the support of Roman opinion would the praetor dare to give the remedies to someone other than the *heres*, especially if an *heres* did exist. Several cases will be seen where the praetor either went beyond the civil law to find a successor (*supplendi iuris gratia*) or even preferred his own choice to a true *heres* (*corrigendi iuris gratia*). However, for the major part, the praetor would be intending to do no more than assist the heir whom the law recognised (*adiuvandi iuris gratia*). The normal case would in fact be the one where a document (the written *nuncupatio*) is produced that complies with all the requisites of the civil law. When such a document existed any reasonable person would assume it to be a *testamentum* until the contrary were proved. If the will were oral it would be different: one would want proof of the whole transaction. The praetor was, however, always cautious in his giving of *bonorum possessio*, at least in the early stages. He would grant it only where the document had been sealed by the seven witnesses (including the *libripens* and *familiae emptor* who were now no more than witnesses, albeit picturesque ones): if the seven seals were on it, it was a *testamentum* as far as he was concerned; if they were not on it, it could still be a *testamentum*, but the claimant would have to prove it fully and if he did so then he would satisfy the *ius civile* rules and qualify for its remedies and so not need *bonorum possessio*. This reasoning and the almost universal practice of writing out the will on wax tablets and then sealing them explain clearly the restriction of this type of *bonorum possessio* — *secundum tabulas*.

Now whilst the tablets presented to the praetor would nearly always be a true *testamentum*, it was just possible that the ritual of the *mancipatio familiae* and the *nuncupatio* had been either omitted altogether or improperly performed. In such a case, of course, the 'will' would be void at civil law and no '*testamentum*', and if this were so, the praetor would not be able to change or resist the civil law. However, the praetor's sharp distinction between possessory and proprietary remedies and his rigid refusal to allow title to be pleaded against a possessory action was vital here. It meant that to

obtain the best remedies the 'heir' named in the tablets did not have to do more than produce them sealed satisfactorily, and if anyone (especially, of course, the intestate heir) wished to complain his only mode would be the cumbersome civil law actions — with the *bonorum possessor* favourably placed as defendant and the burden of proof on the plaintiff. Then again, *usucapio* would run to perfect the title, even if it were defective. Presumably the *usucapio* would not be *pro herede* but on the praetor's *iussum*, so that the period for immovables in the *hereditas* would be the normal two years.

The practice of granting *bonorum possessio secundum tabulas* was fully established before the end of the Republic, and it must soon have displaced the civil law remedies in the vast majority of cases. The will with the seven seals would satisfy not only the praetor, but the public generally. It is true that the *bonorum possessio* was defeasible (*sine re*) because a true heir could bring his civil *petitio* which the *possessor* could not resist if the ceremonies had been improperly performed. It is further known that it was only in Gaius' time that the Emperor Antoninus Pius enacted that the *possessor* should be able to defeat the claim of the civil law *heres* by an *exceptio doli*. Gaius makes play of this constitution, which in effect makes the *bonorum possessio cum re*. However, it may not mean that this legislation marked a great change in policy; in fact, it may have been the culmination of policy. The constitution was a rescript and it is quite conceivable that for many years no one had thought to challenge the 'praetorian will' merely on the grounds of lack of ceremony. Such a will was clearly enough the expression of the testator's wishes and the witnesses would not be likely to help the intestate heir investigate any irregularity. For many years, over a hundred perhaps, there may never have been a questioning of the 'praetorian will', and all such documents would naturally be called *testamenta*. Then, suddenly and unexpectedly, an intestate heir was able to prove that there had been no *emptio familiae*; he brought his *hereditatis petitio*; there was reference to the Emperor, who thereupon abolished an anomaly from the past. Jurists, and especially the historically-minded Gaius, would then make a point of stating what the law had hitherto really been, whereas before the rescript they might well have disregarded the problem or thought it academic.

This is, of course, mainly conjecture and it is possible that the rescript made a real break in the law rather than a final harmonisation.

After the rescript the will *per aes et libram* had few advantages over the less formal praetorian document, but it was probably still employed in most cases of testation. There are some grounds for thinking that, at least in the later classical period, *bonorum possessio* was accorded to the oral will under a proper *mancipatio familiae*, but it is much disputed. It must finally be added that *bonorum possessio secundum tabulas* occurred, as will be seen, in contexts other than that of the 'praetorian will'.

Wills in late Law. After the classical period the history of will-making becomes complex and in many respects uncertain. Broadly speaking, for a further century or two the position in the West remained much as it had been, while in the East various less formal practices, probably of Greek or oriental origin, grew up and much legislation was passed from time to time. Thus, from A.D. 413 an unwitnessed will could be valid if it were enrolled with the court or placed in the public archives. Oral wills with seven witnesses were valid in the late Empire, at least if made in an emergency. However, the really important form was the *testamentum tripertitum* introduced by Theodosius in A.D. 439. This was so called not because it was in three parts, but because its provisions were drawn from three sources. From the old *ius civile* were derived the need for seven witnesses and the necessity for the will to be made *uno contextu* — as a single act; from praetorian law came the requirement of sealing by the witnesses; and fresh from imperial decree was the provision demanding *subscriptio* by the testator and witnesses. This was a writing acknowledging one's act or one's seal and would normally be a signature of sorts. If the will was holograph (*i.e.* in the testator's own hand) that was sufficient *subscriptio*. The tripartite will remained the normal form under Justinian.

Specially Privileged Wills. Soldiers and sailors enjoyed special privileges with regard to will-making from the time of Julius Caesar onwards. Allegedly on account of their inexperience, they were allowed, while on active service, to make a

valid will without any formality ; if the will was written, no witnesses were required ; and even in the case of an oral will the usual number were unnecessary, one or two to prove what the soldier said, and that he spoke seriously, being sufficient. Trajan provided by *mandatum* that one who benefited under the alleged will could not be the sole witness. Justinian restricted the privilege to the period of actual military service, but the will remained valid for a year after honourable discharge ; if the testator died within the year it was valid even if the heir was instituted on a condition which was not fulfilled until after the year. If, however, the soldier was discharged in disgrace the will failed immediately. A soldier's will was also privileged in that it could be made even by a deaf and dumb person and might only dispose of part of his property, for the rule *nemo pro parte testatus, pro parte intestatus decedere potest* did not apply ; further, the *hereditas* might be exhausted by legacies or *fideicommissa*, for the *lex Falcidia* and the *S.C. Pegasianum* also had no application. *Peregrini* and *Latini Iuniani* could be made heirs or legatees, but *incertae personae* only as far as under the general law. The *lex Iulia* and the *lex Papia* did not extend to military wills, which also could not be upset by a *querela inofficiosi testamenti*. It was unnecessary for a soldier to disinherit his children, for his silence was a tacit disherison, but the will might fail if he were ignorant that he had children. Again, a soldier's will remained valid in spite of his undergoing *capitis deminutio*, and there were several other privileges. Finally, it may be noted again that a soldier *filiusfamilias* had his powers of testation over his *peculium castrense* from the early Empire.

Other examples of special wills in Justinian's time were —

(i) *Testamentum parentis inter liberos* ; i.e. if a man bequeathed his estate solely to his own issue, a holograph will was valid without any witnesses. This was the culmination of much varying legislation since Constantine.

(ii) *Testamentum tempore pestis* ; where the testator was suffering from a contagious disease, the witnesses need not be actually present.

(iii) *Testamentum ruri conditum* ; for a will made in rural areas five and sometimes fewer witnesses were enough (instead of the normal seven), and if some of the witnesses could not write, their signatures were dispensed with.

2. *Codicilli*

A codicil in English law is a supplement to a will, made after its execution, and itself executed in the same way as the will. At Rome, *codicilli* had no necessary connexion with a testament; they were small tablets used for writing memoranda or letters. Justinian tells us that Lucius Lentulus, when dying in Africa, wrote *codicilli* (which were confirmed by his will), in which he requested Augustus to perform something by way of trust (*fideicommissum*) for him. Augustus seems to have doubted whether this was legal (as a will ought to be made 'at one and the same time'), and he consulted Trebatius on the point. Trebatius, on the ground of convenience, advised the Emperor to admit the codicils, and Augustus performed the trust, as did others upon whom trusts had been imposed by Lentulus — the latter's daughter paid some legacies which she was not legally bound to pay. *Codicilli* thus obtained recognition along with *fideicommissa* (*post*, p. 278) and thereafter their histories were always closely linked.

At first no particular form was required for a codicil, but by the time of Theodosius II all codicils were required to be witnessed in the same way as wills (*i.e.* by seven witnesses, though Justinian reduced the number to five, and there may have been an exception for holograph codicils, at least if confirmed). Justinian also provided that if a codicil had been made without the necessary formality, the person in whose favour it was made might claim, but would fail if the heir denied the fact on oath.

A codicil might be (a) annexed to a will (*codicilli testamentarii*) — either confirmed by it (*codicilli confirmati*) or not (*codicilli non confirmati*); (b) independent of any will (*codicilli ab intestato*). Accordingly, a practice arose of adding a *clausula codicillaris* to wills, by which the testator declared that if his will failed to take effect, it was to be construed as a series of *fideicommissa* made by *codicilli* and affecting the 'intestate' heir. However, all but close relatives would have to elect how it was to be treated; *e.g.* if they elected to treat it as a will and it turned out to be an invalid one, they would lose everything.

At no period was it possible, however, to accomplish by means of *codicilli* everything which could be done by a will.

In the time of Gaius their chief use was to impose *fideicommissa*; and Gaius tells us that though a *fideicommissum* might be imposed by an unconfirmed codicil, a legacy bequeathed by codicil was invalid unless confirmed, *i.e.* unless the testator in his will had expressly declared that effect should be given to any gift made by him in any codicil, and Gaius further states that no one could be instituted heir or disinherited even by a confirmed codicil, though the same effect as institution could be produced by a codicil's requiring the heir instituted by will to hand over the *hereditas* or part of it by way of *fideicommissum*. In Justinian's time the distinction between confirmed and unconfirmed codicils was of little practical importance (because of his assimilation of legacies and *fideicommissa*—*post*, p. 280), but he tells us that where codicils are made before the will they take effect only if specially confirmed by the will; he added, however, that Severus and Caracalla had decided that persons to whom things were given by way of *fideicommissa* by a codicil made before a will might take them if it appeared that the donor had not abandoned his intention in their favour. Justinian confirms the statement made by Gaius with regard to the institution and disinheritance of heirs and adds that a condition cannot be put upon the testamentary heir by a codicil, nor can a direct substitution be made by one.

(B) The Contents of the Will and Rules thereto Relating

There were certain general principles underlying the making of wills which need to be considered here. (1) *Institutio heredis*, the appointment of an heir, was the primary, and perhaps, at first, the only purpose of the will. In classical law it had to occupy first place in the will, except for disinheritances and perhaps appointments of tutors; certainly any provision that in any way lessened the assets of the *hereditas*, such as legacies and manumissions, were void if placed before the *institutio*. As will be seen, Justinian changed the rule. (2) As the succession was *per universitatem*, the heir or heirs had to be appointed to the whole of the estate, for *nemo pro parte testatus, pro parte intestatus decedere potest* (no one can die partly testate and partly intestate). (3) The rule *semel*

heres, semper heres (once heir, always heir) prevented the institution of an heir for a certain time. Minor rules concerning the institution of the *heres* will be dealt with under that head. Of more particular rules let us consider —

1. Rules for the Protection of the Family

(a) *Exheredatio*. (b) *Querela inofficiosi testamenti*.

(a) *Exheredatio*. On the death of a person intestate those persons (called *sui heredes*) succeeded to him who were in his power at his death and who by his death became *sui iuris*. But traces of the old conception that the property belonged to the family, and not to the *paterfamilias*, remained even in the developed law, and Gaius tells us that *sui heredes* were regarded, even in their parent's lifetime, as in a sense owners of the family property. This conception gave rise to the rule that it was the duty of a testator either expressly to institute as his heirs or expressly to disinherit those persons who, but for the will, would have taken the property. If not so disinherited they were known as *praeteriti*, and the whole will might fall to the ground; in which case, of course, the property devolved as on an intestacy. A woman, however, was not obliged to disinherit, because she could have no *sui heredes*. According to the ancient *ius civile*, if a son in *potestas* was not instituted *heres* it was necessary to disinherit him by name or by an expression that clearly designated him alone (e.g. 'my eldest son' or, where there is only one, 'my son'), and failure to comply with this rule made the whole will void. If a *suus filius omissus* died before the testator the Proculians held that the will was saved, but the Sabinian view that it was void prevailed. Other *sui heredes* (e.g. a daughter or grandson, the father being dead or disqualified, e.g. by emancipation) had also to be disinherited; but a general clause (*inter ceteros*) was enough, e.g. '*Ceteri omnes exheredes sunt*'. And failure to disinherit them had not the same consequence as with a son; the will was good, but the *praeteriti* came in with the heirs instituted in the will and shared with them by accretion; if the instituted *heres* was a *suus*, the *praeteriti* shared with him equally; if a stranger (*extraneus*), the *praeteriti* took half the inheritance. If there were instituted both *sui* and *extranei*, the *praeteriti* (or *praeteritae*) shared equally with the *sui* and took half as against the *extranei*. For example —

(i) Titius has three sons and a daughter, Julia. By his will he institutes his three sons heirs and fails to disinherit Julia. Julia takes an equal share (*pars virilis*) by accretion, and so gets exactly what she would have obtained on an intestacy, *viz.* one-fourth part of the estate.

(ii) Titius has no *sui heredes* save one daughter, Julia. By his will he institutes an *extraneus*, Balbus, heir and fails to disinherit Julia. Balbus and Julia each take half the inheritance, and Julia would have taken half even though two or more *extranei* had been instituted.

(iii) If in (i) Titius had instituted his three sons and an *extraneus* each to one-quarter, and omitted Julia, Julia would have shared equally with her brothers, taking one-quarter of three-quarters and, in addition, one-half of the quarter share given to the *extraneus*, or five-sixteenths in all — a rather surprising and certainly unfair result.

Towards the end of the Republic the praetor began to amend the law: he required all male *sui* (e.g. a grandson not less than a son), if not instituted, to be disinherited by name, though females could still be disinherited by an *inter ceteros* clause. If the *omissus* was a *filius* the will was, of course, void at civil law and the praetor gave *bonorum possessio* on the intestacy; all the terms of the will were therefore disregarded. As regards other *sui omisi*, if his requirements were not fulfilled the praetor did not avoid the will but granted *bonorum possessio contra tabulas* to the *praeteriti*; if the *institutus* was a *suius heres* the *praeteriti*, by *bonorum possessio*, shared with him as on an intestacy (e.g. if a son were instituted but two grandchildren by a deceased son were *praeteriti*, the son would take half and the grandchildren a quarter each as in rules *ab intestato unde liberi*); if, however, the person instituted was an *extraneus*, the praetor went further than the civil law, he granted the *praeteriti bonorum possessio*, not merely, as at *ius civile*, of half the estate, but of the whole, so that the *extraneus* got nothing: he remained legally and technically *heres*, but his heirship was worthless. Antoninus Pius (or Caracalla), however, amended the law: if the persons who were not disinherited were females (*suae praeritae*) they were only to get by *bonorum possessio* what they would have taken at *ius civile*, *i.e.* half, instead of the whole of the estate.

Bonorum possessio contra tabulas had many intricate rules.

Thus most manumissions and legacies failed, except for legacies to close relatives. Appointments of tutors may have required confirmation by the praetor. As seen, institutions of *sui* were valid, and so were pupillary substitutions. Disherisons also stood, so that a son duly disinherited would get nothing if a grandson claimed *bonorum possessio contra tabulas*. Had another son been *omissus* then the will would have been completely void and the disinherited son could have claimed his share *ab intestato unde liberi* along with the *omissus*.

The praetor's grant must have been *cum re* either from the start or very early on. The incursion into the rights of the *extranei* was such that it could not have been *sine re*. It can be surmised that the praetor had popular sentiment very much with him to be able to effect such radical changes and that Roman opinion of the time still sternly upheld the moral duties of the *paterfamilias* towards his descendants.

Emancipated *liberi*. According to the civil law it was unnecessary to disinherit a person who was not a *suus heres* of the testator because he had been emancipated; e.g. *A* had two sons, *X* and *Y*, and emancipated *X* in his lifetime: on *A*'s death *Y* was his sole heir. *X* was not *suus heres*, because he had not become *sui iuris* on his father's death (as *sui heredes* must), but earlier, on emancipation; it was unnecessary, therefore, either to institute or to disinherit him. The praetor, however, altered the law by providing that such persons had to be either instituted or disinherited — males by name, females *inter ceteros*. The *emancipati* therefore ranked with *sui omitti* for the purposes of the fully effective *bonorum possessio contra tabulas*, but their omission could not cause an intestacy as that of a *filius suus* could. The same rules of *collatio bonorum* applied *contra tabulas* as will be seen *ab intestato*: the *emancipatus* who claimed had to bring any assets acquired since emancipation into 'hotchpot' in order to avoid injustice to the *sui* (*post*, p. 293).

Adoptivi, so long as in the *potestas* of the adopter, were in the same position as natural children and therefore had to be instituted or disinherited according to the rules of the civil law. Conversely, they were regarded as strangers to their real father so long as they were members of their new family, and so disherison was unnecessary. If an adoptive child was emancipated by his adoptive father the child had no claim,

either by *ius civile* or by *ius honorarium*, in regard to his adopter's estate, and at first no claim in regard to his real father's estate ; but the praetor amended the law and gave him *bonorum possessio* to his natural father's estate, unless such father had disinherited him.

Postumi are persons who, though not heirs at the date of the will, become so afterwards. Such *postumi* are of two main kinds —

(i) *Postumi* in the strict sense, i.e. sons and daughters of the testator who become his *sui* by being born to him after the date of the will.

(ii) Persons *postumorum loco*, e.g. —

(a) Descendants who become *postumorum loco* by *quasi agnatio* ; e.g. *A* has both a son, *B*, and *C*, a grandson by *B*, in his *potestas*. *B* is *A*'s *suus heres* to the exclusion of *C*, but if *B* ceases to be in *A*'s power during *A*'s lifetime (e.g. dies or is emancipated), *C* will by quasi-agnation succeed to his father's place and become *A*'s heir. *C*, therefore, is said to be *postumi loco*.

(b) Persons brought under *potestas* by marriage *in manum*, adoption, adrogation, or legitimation.

The ancient civil law in its requirements with regard to *praeteritio* made no distinction between persons already *sui* and persons who might become so (*postumi*), but a *postumus*, being necessarily an *incerta persona*, was originally incapable of being instituted or disinherited. Nevertheless, despite the testator's inability to institute or disinherit him, the fact that a person became a *postumus suus* after the date of the will totally invalidated it. Even if one *postumorum loco* was alive at the time of making the will and was instituted or disinherited, the will was made invalid because he had not been instituted as *suus* and disinheritance of an *extraneus* was meaningless. This harsh rule persisted for most of the Republic, and thereafter the process of alleviation was both very gradual and only partial. The praetor intervened in one case only : where a true *postumus* died before the testator, his existence alive for the shortest time destroyed the will at civil law, but the praetor gave *bonorum possessio secundum tabulas* to those named in the will and the grant was *cum re*. All other changes were due to developments by the jurists — particularly in their function of *cavere* — and to legislation.

The first great change was when formulas for instituting and disinheriting *postumi* born after the testator's death came to be accepted as valid — probably at the end of the Republic. Then the *lex Iunia Velleia* in the early Empire validated wills in which the testator either instituted or disinherited (i) any *postumus* born between the will and the testator's death and (ii) anyone *postumorum loco* by *quasi agnatio* on the death or emancipation of his father. The development continued until the end of the classical period, by which time there was a general principle that any *suus* arising after the will could be properly instituted or disinherited provided his becoming *suus* was an entirely natural process on his own part (e.g. birth, or survival of his father's death or emancipation). However, no concessions were made in respect of the class of those *postumorum loco* by virtue of acts bringing them into the testator's *potestas* after the will and thus involving a *capitis deminutio* on their part. One very minor exception was made in a rescript of Hadrian: if a child was instituted or disinherited in the will of his father and after the latter's death a suit for *erroris causae probatio* was brought on the child's behalf, its posthumous arrival in the *potestas* did not upset the will. This was, however, never extended beyond these limited facts, and it remained the sole exception. Even under Justinian, acquisition of a *suus* by adrogation, adoption or legitimation after making a will was fatal to the will's validity.

So far as it was possible to disinherit *postumi* the rule was that male *postumi* had to be disinherited by a sufficient description, females *inter ceteros*; but if the clause was quite general, e.g. '*ceteri exheredes sunt*' (i.e. with no mention of *postumi*), it was not a good disinheritance unless, in the case of a daughter or grandson, the testator gave legacies to them, so as to show that in framing the general clause he had them in mind.

With regard to a *postumus alienus*, i.e. an afterborn child of some third person, the civil law rule was that such person (being as much an *incerta persona* as a *postumus suus*) could not be instituted, but the praetor granted *bonorum possessio* to such a person, if instituted, and Justinian provided that he might even be made legal heir.

Justinian tells us in his Institutes that he made certain changes in the law of *praeteritio* —

(i) He abolished the distinction between males being dis-

inherited *nominatim* and females *inter ceteros*, so that all descendants who might succeed had to be disinherited *nominatim*; otherwise, if the *praeteritus* was a *suus heres* (whether male or female) the will was void; if the *praeteritus* had been emancipated the will was not upset, but the *praeteritus* got *bonorum possessio contra tabulas*.

(ii) A child, even though given in *adoptio* (unless the *adoptio* were *plena*), had to be instituted or disinherited by his natural father. Conversely, the adoptive father would have to institute or disinherit the adopted child if the *adoptio* were *plena*.

Justinian's wider changes, contained in the 115th Novel, will be noticed in connexion with the topic next dealt with.

Not only is the whole law of *exhereditatio* extremely technical, but it seems strange in modern eyes. It is in fact a limitation on a testator only as to *form*. If he observes the due formalities and avoids the many pitfalls, his dependants can still be ruthlessly excluded from provision. In the early days, when wills were publicly declared, the testator might well have found this formal fetter a very strong deterrent: he might have had to make a reasoned defence of his disherisons before the *populus* would sanction the will in the *comitia calata*. To modern eyes, however, the rules of form would seem to have had only a nuisance value once the will had become secret. One can only assume that Romans viewed the matter very differently, for otherwise it would be scarcely credible that the rules could last right through the law's history. Perhaps the answer lies in the moral outlook of the typical Roman *paterfamilias*: he would not fail to make provision without making it very clear that he felt he was justified in passing over his offending dependant. *Exhereditatio* would be as much a moral duty as *institutio*. That eventually there were some scandalous cases of disherison is clear from the emergence of the *querela*, next to be dealt with. However, the residuary character of that remedy — that it should only be used where the *exhereditatio* rules were not infringed — shows that the requirements for disherison were popularly regarded as still very effective. The normal *paterfamilias*, under the influence first of early Roman outlook, then of Stoic philosophy, and finally of Christian ethics, would wish to be regarded as *bonus*, and the solemn function of just distribution of property in his will

legal grounds (which he specified) to justify the disinheritance was stated in the will and could be proved. If a testator failed without due cause to institute a person who had a claim to be instituted under the above provision, the actual institution was void and the *praeteritus* became heir as on an intestacy; the will, however, was not wholly avoided, but only to the extent of the institution — e.g. legacies, *fideicommissa*, and appointments of guardians remained valid. If, on the other hand, the testator had instituted a person whom he was bound to institute heir, but had given him less than his lawful share in the estate, the will remained valid in this case also, but the claimant had an *actio ad supplendam legitimam* against the heir. The rights of brothers and sisters, however, were not altered by this Novel. If the share they obtained under the will were less than their lawful share, they could presumably bring the *actio ad supplendam legitimam*; if they received nothing and the instituted heir were *turpis*, they could bring the *querela inofficiosi testamenti* for their intestate portion. As between ascendants and descendants, however, the *querela*, after this Novel, became unnecessary, and as regards all heirs, the importance of *praeteritio* was considerably modified, since it was of no avail to disinherit the *heres* unless a statutory ground could be adduced for it.

There existed from the late classical period two other *querelae* (*inofficiosae donationis* and *inofficiosae dotis*) which were supplementary to the main *querela*. They were the subject of much technical legislation, but their main purpose was to prevent a testator's thwarting the main *querela* by largesse in his lifetime.

It may finally be noted that several specific provisions existed under which a will might be fully or partially defeated. Thus the *patronus* could get *bonorum possessio contra tabulas cum re* against a *filius adoptivus* or an *extraneus heres* of the *libertus* to the extent of one-half of the *hereditas*; and, as already seen, an *impubes adrogatus* was entitled to his *quarta Antonina* (*ante*, p. 119).

2. Heirs and their Institution

(a) Classes of Heirs

There were at Rome three possible classes of heirs under a will: (i) *necessarii*, (ii) *sui et necessarii* and (iii) *extranei*.

an imputation on the testator's sanity, and so is not lightly to be issued.

(4) He must not have deserved to be disinherited or omitted; a claimant, therefore, would be defeated if the instituted heir proved, *e.g.*, that the disinheritance was due to gross ingratitude towards the testator.

(5) He must not have acquiesced in the testator's decision, *e.g.* by accepting a legacy. (But a tutor does not bar his own right to a *querela* if he accepts a legacy for his ward.) A genuine compromise (*transactio*) would also bar the *querela*.

(6) Not more than two years at first (five years later) must have elapsed since the heir made *aditio*.

The effect of a successful *querela* was, in the ordinary case, to upset the will altogether; whereupon, of course, the claimant got his share as on an intestacy. But it might, exceptionally, produce only a partial intestacy, contrary to the rule *nemo pro parte testatus*; *e.g.* where there were several heirs and the *querela* was brought against only one, or where there was a compromise. If the claimant failed, any benefit given him by the will lapsed to the *Fiscus*, but if a tutor brought the *querela* in his ward's name (because the ward's father had left his son nothing), and failed, the tutor would not forfeit any legacy given to himself by the will.

Some time before Theodosius II the rule was introduced that, if there was a direction in the will to make up the requisite legal portion, the *querela* was excluded, the claimant's remedy being an action *ad supplendam legitimam*.

Justinian altered the law, for, as he tells us in his Institutes, he provided that the *querela* should be brought only where the claimant had received nothing at all under the will. If under it the claimant had obtained anything, however small, he could bring against the heir only an *actio ad supplendam legitimam*, which did not upset the will, but enabled the claimant to get what was left to him made up to one-fourth of the share which he would have taken on an intestacy. Next, by his 18th Novel, Justinian enacted that a testator with four children or less must leave at least one-third of his estate among them equally; if he had more than four, at least a half had to be so left. Finally, by his 115th Novel, Justinian provided that an ascendant was bound to institute as heirs those descendants who would have taken on an intestacy, and *vice versa*, unless one of the definite

legal grounds (which he specified) to justify the disherison was stated in the will and could be proved. If a testator failed without due cause to institute a person who had a claim to be instituted under the above provision, the actual institution was void and the *praeteritus* became heir as on an intestacy; the will, however, was not wholly avoided, but only to the extent of the institution — e.g. legacies, *fideicommissa*, and appointments of guardians remained valid. If, on the other hand, the testator had instituted a person whom he was bound to institute heir, but had given him less than his lawful share in the estate, the will remained valid in this case also, but the claimant had an *actio ad supplendam legitimam* against the heir. The rights of brothers and sisters, however, were not altered by this Novel. If the share they obtained under the will were less than their lawful share, they could presumably bring the *actio ad supplendam legitimam*; if they received nothing and the instituted heir were *turpis*, they could bring the *querela inofficiosi testamenti* for their intestate portion. As between ascendants and descendants, however, the *querela*, after this Novel, became unnecessary, and as regards all heirs, the importance of *praeteritio* was considerably modified, since it was of no avail to disinherit the *heres* unless a statutory ground could be adduced for it.

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There were at Rome three possible classes of heirs under a will: (i) *necessarii*, (ii) *sui et necessarii* and (iii) *extranei*.

(i) A *necessarius heres* was a slave of the testator whom he appointed heir, at the same time giving him his freedom. Until Justinian's time the institution of one's slave without an express gift of freedom annexed to it was a complete nullity — even if the slave was freed or sold to a third party before the testator died. If, however, freedom was expressly granted with the institution, the institution remained valid even though the slave were later manumitted or alienated. The ex-slave or alienated slave would, of course, rank as an *extraneus heres* in such cases and either he or his new master was thus entitled to reject the inheritance. Justinian provided that institution should imply manumission, and the consequences of a manumission or alienation by the testator before death were the same as when, previously, there had been express manumission.

The usual purpose of this type of institution was that if the estate were insolvent it might be taken in execution as the slave's, and not in the name of the testator, and so the disgrace attaching to insolvency would be avoided. A slave appointed heir was called *necessarius* because he had no option. Only one slave could be so appointed, for creditors must not be made to suffer more than need be. The *lex Aelia Sentia* did not apply to make the manumission void as a fraud on creditors, and, moreover, despite the *lex*, a slave under thirty years of age could be fully manumitted to become *heres*. (A slave held *in bonis* by the testator, however, could not be made a *necessarius heres* because he would become only a Junian Latin.) Because the slave had no choice, he became heir, without any formal act, from the moment of the testator's death. According to the civil law, he had to satisfy the testator's debts, if necessary, out of his *peculium* and his future acquisitions. The praetor, however, allowed him, upon application, the *beneficium separationis*; i.e. he might keep all property made by his own exertions since the death of the testator, but all the *hereditas*, including the *peculium*, and anything he acquired later by virtue of being heir (e.g. the property of a deceased Junian Latin freed by the testator) were available to creditors of the testator. It may finally be noted that a person held *in mancipio* might be instituted *necessarius heres* in the same way as a slave, but in such a case the praetor conferred on the bondsman a *ius abstinendi* similar to that of a *suus heres* and not a *beneficium separationis*.

(ii) A *suus et necessarius heres* was a person who was in the *patria potestas* of the testator at his death and who by that death became *sui iuris*. The term '*suus heres*' was idiomatic and is most puzzling: it may reflect an original conception of ownership by the whole *familia*, not by the *paterfamilias* alone, or it may just indicate the family tie. The *suus* was *necessarius*, because he too, like a slave, had no option; he became heir, without any need for assent, from the moment of the death, and so became liable for his ancestor's debts out of his own property. But these heirs came also to be protected by the praetor, by the *ius* or *beneficium abstinendi*. Provided they took care not to act as heir in any kind of way, then, whether they formally demanded the privilege or not, their own property could not be made liable for their ancestor's debts. *Bonorum venditio* (with the disgrace attaching to it) would lie against the deceased's estate alone, but the will would be valid because there was an heir, albeit a protected and non-functioning heir, and so provisions such as appointments of tutors, pupillary substitutions (to be dealt with shortly) and even non-fraudulent manumissions would be valid.

(iii) An *extraneus heres* is any heir not within (i) or (ii). Since a mother did not enjoy *patria potestas*, and, therefore, had no *sui heredes*, her own children appointed heirs by her will were *extranei*.

An *extraneus heres*, however, did not immediately become heir upon the testator's death (as was the case with a slave or a *suus heres*): he had in some way to show that he accepted the position (acceptance being technically known as *aditio*), and, until he accepted, the *hereditas* was known as *hereditas iacens* and could, in a sense, acquire certain rights (e.g. *fructus naturales*, or through the *peculium* of slaves, or on their verbal contracts, or by reason of wrongs done to them). On such rights the heir (to whom the *hereditas* was said to be *delata* until *aditio*) could sue after acceptance. Ulpian tells us that the *hereditas iacens* sustained the 'personality' (*persona*) of the deceased, not of the heir, while Pomponius makes it sustain that of the heir. These apparently contradictory statements may, perhaps, be reconciled on the theory that, until the heir accepts, the *hereditas* sustains the *persona* of the testator, but that once the heir enters all the rights and liabilities which have accrued to the *hereditas* between death and entry pass to

the heir, whose acceptance may therefore be looked upon as retrospective. However, in any case, this talk of *persona* is very much a case of theorising by the jurists and the compilers on a number of technical rules that arose by reason of their convenience and not their symmetry.

Since, until the heir made *aditio*, there was no person who could legally be answerable to creditors and to legatees or perform the *sacra*, the practice arose, Gaius tells us, for the testator in appointing an *extraneus heres* to limit the time within which the *extraneus* might make up his mind. The clause in question was called *cretio*, from *cernere* or *decernere*, 'to come to a decision', and ran as follows: 'Let Titius be *heres* and accept within 100 days, otherwise let Titius be disinherited and let Maevius be *heres*'. This kind of *cretio* was called *continua* or *certorum dierum*, and time began to run immediately from the testator's death. The more common form, however, was the *cretio vulgaris*, in which, after the words '100 days' (which would be the normal period, but a testator might give a shorter or longer time), were added '*quibus sciet poteritque*', so that time did not necessarily run from the testator's death, but from the time when Titius first knew that he had been made heir and was in a position to accept. Whichever the form of the *cretio*, Titius had within the time specified solemnly to signify acceptance in these words: 'Balbus having instituted me heir by his will, I enter upon and accept the inheritance'. If he failed to do this the clause operated automatically to disinherit him at the end of the period. But just as during the period nothing short of a formal acceptance made him heir, so also an informal renunciation did not bind him: he was free to make a proper acceptance on the very last day, even though in the interim he had formed the intention of disclaiming.

The testator had to use the whole form as shown in order to make his provision effective, *i.e.* there had to be (i) an order to make *cretio* after institution; (ii) an *exheredatio* in default; and (iii) a *substitutio* of another *heres*. If the two latter were missing the order for *cretio* seems to have been totally ineffective, whilst, if a substitution was inserted in default without a prior disinheritance, various very technical rules came into operation — as will be seen under the topic of *substitutio*. Where the testator omitted to insert an effective *cretio*, the

heir might make *aditio* by acting as heir (*pro herede gestio*); by the time of Gaius, even an informal declaration of intention to be heir would suffice; if he declined informally he effectively abandoned his right, but he was not bound to make up his mind within any definite period. Accordingly, the custom arose for the praetor, on the application of the creditors of the estate, to fix a time (*tempus ad deliberandum*) within which the heir must decide. (A similar *spatium deliberandi* could be fixed at the request of the creditors in the case of a *suus heres* in respect of his *ius abstinendi*. It seems that only creditors could apply for any fixing of a *spatium deliberandi*, not, e.g., substitute or intestate heirs.) The praetor would even cut down the time specified in the *cretio* if he considered it too long. If the heir failed to accept within the limit so set, the praetor might thereafter allow the creditors to sell the estate. The fixing of a time by the praetor being obviously more simple than the formal *cretiones*, the latter seem to have fallen into disuse after Gaius and were abolished by Arcadius and Theodosius. In the time of Justinian, therefore, an *extraneus heres* (like other heirs) was appointed without any *cretio* and might accept or repudiate the inheritance by any sufficient declaration of intention, though made informally; he might accept, e.g., by *pro herede gestio*, i.e. by doing any act in relation to the *hereditas* which could only be done legally in his capacity as *heres*. If he delayed to enter, not more than nine months (one year exceptionally, with the Emperor's permission) were allowed him; if he had done nothing in that time he forfeited his right to accept.

Justinian, however, made a still more important reform in the introduction of the *beneficium inventarii*. Hitherto, upon the principle *semel heres, semper heres*, the heir once constituted was identified with his testator or ancestor; *confusio* of the property of the deceased and the heir took place, so that not only did the *hereditas* become answerable for the obligations of the heir, the heir was for ever liable for the obligations of the deceased out of his own pocket. Even before Justinian, however, the strictness of the civil law rule had been relaxed. If the creditors of the *hereditas* feared that the heir's personal debts (being greater than his assets) might exhaust the deceased's estate, the praetor allowed such creditors to apply for *separatio bonorum*, i.e. to have the two estates strictly kept

apart, provided — (a) that the application was made within five years ; (b) that separation was still possible ; and (c) that the creditors had not treated the heir as their debtor. If the *separatio* was granted, the creditors had the right to pay themselves out of the *hereditas* in priority to any claims on the part of the creditors of the heir. There is an unsettled doubt whether the creditors of the *hereditas*, if they took this course and the estate proved insufficient, could still claim the balance from the heir. Papinian thought they might be admitted to sue him after his personal creditors had been satisfied out of his own property, but Ulpian and Paul held that by obtaining *separatio bonorum* the creditors lost all rights against the heir.

Conversely, the strictness of the civil law rule was soon modified in favour of the heir by means of the analogous *separatio bonorum* granted to the slave who became *necessarius heres*, and the *ius abstinendi* accorded to the *suus*, while the *extraneus* always had the right to decline. Nevertheless, before Justinian's change, the rule *semel heres, semper heres* might operate harshly. Once a *suus* of full age, for example, intermeddled with the estate, and once an *extraneus* accepted, each became heir and thus answerable absolutely, the only possible cases of revocation being : (a) where the praetor set the acceptance aside on the ground that it had been made by an *adolescens*, i.e. a person under twenty-five years ; (b) where the person accepting was a soldier (but only after the time of the Emperor Gordian, who introduced the privilege) ; (c) under an imperial rescript. In all other cases, after acceptance, the heir was personally liable and might, if the estate proved insolvent, be reduced to absolute ruin.

Justinian, accordingly, remedied the hardship and applied in favour of the heir the principle underlying the praetorian grant of *separatio bonorum* to creditors. He enacted that the liability of the *heres* (of whatever kind he might be, and whether testamentary or intestate) should be confined to the assets of the deceased, provided — (i) that he did not ask for a *spatium deliberandi* ; (ii) that he made an inventory of the deceased's estate and effects — this inventory had to be taken in the presence of witnesses, and begun within a month and finished within three months from the time the heir first knew that he had become so. If, instead of making an inventory at once, the heir asked for a *spatium deliberandi*, the position was as

under the old law. Moreover, the heir who failed to make an inventory or did not reject within the time limit also forfeited his right under the *lex Falcidia* to retain for himself a quarter of the net estate against legatees.

(b) The Institution of Heirs

The institution of an heir or heirs, Gaius tells us, is the foundation of the entire will; and, therefore, according to the civil law, such institution must precede all other dispositions made by the will except disherisons and, according to the Proculian view, the appointment of tutors. Therefore, Gaius says, before an heir is instituted it is useless to give legacies or to make a bequest of freedom or, according to the Sabinians, even to appoint a tutor. Justinian, however, considered that it was unjust that the mere order of words should operate to defeat the intention of the testator and allowed all these three things to be validly done before the heir was instituted. Further, the institution of the heir originally had to be made in a formal manner. Instances of an *institutio solemnis* are: *Titius heres esto*, or *Titium heredem esse iubeo*; on the other hand, *Titium heredem esse volo* was not orthodox, nor, according to most lawyers, was *Titium heredem instituo* or *heredem facio*. The law on this point was altered in A.D. 339 by Constantine II, who enacted that a *solemnis institutio* was unnecessary, provided the intention of the testator to make the person in question heir was clear, however informally it might be expressed.

A testator might institute one heir or several, and, if several, their shares were presumed to be equal, but the testator could make them unequal (e.g. *A* one-fourth, *B* three-fourths) by showing that such was his intention. If he only instituted one heir and gave him merely a share of the *hereditas*, such heir took the whole; for a citizen had to die either with a will or without one; the devolution of his property after his death could not be governed partly by the law of testate, partly by the law of intestate, succession. This strict rule of the *ius civile* lasted throughout Roman law except in the case of the military will; the rule was, however, in substance if not in form, often infringed by the operation of *bonorum possessio contra tabulas*, the *querela inofficiosi testamenti*, and the 115th Novel of Justinian.

The Roman practice was to regard the whole *hereditas* as

an *as* — a notional unit divided into 12 *unciae*. A sole heir was *heres ex asse*, an heir to a half *heres ex semisse*, and so on. If the testator gave in shares more than 12 *unciae* the *as* was regarded as made up, not of 12 *unciae*, but of the number of *unciae* specified. If he gave in shares less than 12 *unciae*, the rule was the same. If several heirs were instituted, the shares of some being specified, and of another or others unspecified, then —

(a) If the specified shares did not exhaust the 12 *unciae* of the *as*, the heir or heirs whose shares were not specified took what was left, if more than one, equally.

(b) If the *specified* shares exactly amounted to the whole *as*, each set of heirs took half the inheritance between them.

(c) If the specified shares exceeded the *as*, the *as* was considered as consisting of 24 or, if necessary, 36 *unciae*, and the heirs whose shares were unspecified took the difference; e.g. between 13 and 24, or 25 and 36, as the case might be.

An heir could not be appointed *ex certo tempore* (e.g. 'let Titius become my heir five years after my death'); nor *ad certum tempus* (e.g. 'let Titius be my heir until the Ides of March next after my death') owing to the maxim *semel heres, semper heres*. In both cases the time phrase was ignored. In the late Republic, however, an institution could be validly made subject to a condition which must have been satisfied or not before the testator's death. By the classical period it was permissible to append a condition (*condicio*) that would suspend the institution till an event after the death. This is a condition precedent, and postponement till a *dies incertus* (one certain to occur, but impossible to date in advance, e.g., 'on the death of X') was treated in the same way. A resolute *condicio* (condition subsequent, e.g., 'until X marries') was void as infringing the *semel heres, semper heres* principle — the *institutio* was left perfectly valid. A condition precedent that was impossible, illegal or immoral was struck out leaving the institution effective unconditionally. However, if a condition was theoretically possible, it had to be fulfilled before the heir could take; but there was one exception: if a testator made the *institutio* of his *filius* (not other *sui*) dependent upon a condition that was not reasonably within that son's power to fulfil, the son was treated as *omissus* so that the whole will failed. In the case of a negative condition which could not

be fulfilled until death (*e.g.* never to go to Naples), it became possible for the heir, even according to the civil law, to accept the *hereditas* immediately after the testator's death, undertaking by the *cautio Muciana* to restore the property if he broke the condition.

3. Substitutions

A substitution may be one of three kinds: (a) *vulgaris*; (b) *pupillaris*; (c) *quasi pupillaris*.

(a) *Substitutio vulgaris* is the appointment of an alternative heir, *i.e.* the appointment of an heir to take the place of an heir instituted before him, in the event of the prior heir failing to take, *e.g.* because of: (i) his death before the testator, or (ii) his refusal or failure (within the time limited) to accept, or (iii) his inability to accept owing to some provision of law (*e.g.* the *leges Iulia et Papia Poppaea*, *post*, p. 287).

An instance of substitution is that given above in connexion with the *cretio*, 'Let *A* be heir and decide within 100 days, if not, let him be disinherited and let *B* be heir'. Another would be, 'Let my son Balbus be heir, and if he fail to become so' (*i.e.* by reason of any of the events above-mentioned) 'let Maevius be heir'. As a final substitution a testator often appointed one of his slaves *necessarius heres*, to provide against all the preceding heirs refusing to accept because the *hereditas* was *damnosa*.

As regards *cretio*, if the *cretio* was *perfecta* (*i.e.* with disinheritance, as in the example given) *A* had formally to accept within the time limited or *B* became heir; it was not enough for *A* to accept informally by acting as heir. But if the *cretio* was *imperfecta* (*i.e.* if the words 'let him be disinherited' were omitted) and *A* did not formally accept but 'acted as heir', *A* and *B* shared equally; though if *A* did neither, *B* was sole heir by substitution. According to the Sabinians, *A* did not let in *B* for his half-share by acting as heir until the time had expired within which he might, by a formal acceptance, become sole heir. The Proculians held that even while the *cretio* was running, *A*, by *pro herede gestio*, let in *B* and could not afterwards displace him by a formal acceptance, even though in due time. It was provided, however, by Marcus Aurelius, that even though *A* accepted merely informally within the time it should be a good acceptance and exclude the substitute.

A testator might substitute one for several heirs, or several for one. If a testator originally appointed two co-heirs, *A* and *B*, he often substituted them reciprocally one for the other, so that if *A* failed to become heir *B* became sole heir, and *vice versa*. Where several heirs were substituted, the share they acquired by substitution originally went to them equally, unless the testator expressly provided otherwise; but Antoninus Pius enacted that if the substituted heirs were already heirs in unequal shares they were to take what came to them by substitution in the same proportion; *e.g.* if the testator appoints *A* heir to half the *hereditas*, *B* and *C* to one-fourth each, and they are reciprocally substituted, then if *C* fails to take, *A* will take two-thirds of the estate, *B* one-third.

Suppose *A* is instituted heir, and *B* is substituted to *A*, and *C* to *B*. If *A* fails to take and *B* acquires *A*'s share, and then the dispositions in *B*'s favour fail, *C* obviously takes the whole *hereditas* as *substitutus* to *B*. But *C* would have taken even had *B* died before *A*, because *C* is, by implication, considered as substituted not only to *B* but to *A* also: *substitutus substituto censetur substitutus instituto*.

Suppose a testator instituted as heir *A*, who was really *X*'s slave, but whom the testator believed to be a freeman *sui iuris*, and made Maevius substitute. Then, if the testator died and *A* entered by *X*'s order, *X* acquired the inheritance, and the substitution in favour of Maevius failed. But this was not what the testator meant, he intended Maevius to take if *A* failed to take the inheritance *in his own right*. Obviously *A* has not acquired it in his own right, but on behalf of his master, *X*. As a rough settlement, Tiberius decided that Maevius and the master should each take half.

(b) *Substitutio pupillaris* arose where a *paterfamilias* provided against the case where a *suus impubes* survived him, but died under puberty, thus being incapable of making a will himself. A testator might provide a substitute for each of his *sui* who should die under the age of puberty, or to the last who should die under that age, and the substitution might be in favour of a named person or be general, '*quisquis mihi heres erit idem impuberi filio heres esto*', in which case all the heirs of the father took by substitution in proportion to their shares in the inheritance.

A *substitutio pupillaris* involved two wills, the father making,
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in effect, one for himself, another for the *impubes*; and the ordinary form was: 'Let my son Titius be my heir, but if he fail to become my heir, or if he becomes my heir and dies before he becomes his own guardian, then let Seius be my heir'. But the father need not institute Titius heir, he might disinherit him, and, by the less common form of *pupillaris substitutio*, provide that if Titius died under puberty Seius was to succeed to any property the child might have of his own, *e.g.* bequests and gifts from relatives other than the father. But a *substitutio pupillaris* in every case terminated (*i.e.* the gift by substitution failed) — (i) when the child attained the age of puberty; (ii) if the father's own will in any way failed to take effect at civil law, *e.g.* because no heir would enter; for the will made for the son by the substitution entirely depended on the father's own will; (iii) it is sometimes said that the *substitutio pupillaris* also failed if the son died in his father's lifetime or underwent *capitis deminutio*. But this depended upon the terms used. If the substitution was 'double' (*i.e.* as above, 'if my son — (a) fail to become heir, or (b) become heir and die under puberty'), obviously the words of the testator covered the case; *e.g.* if the son died in his father's lifetime he would fail to become heir and the substitute would take under the very words of the will; if, however, the substitution were simple, *i.e.* limited to the son's becoming heir and dying *impubes*, then if for any reason, *e.g.* death, he failed to become heir, the gift of substitutor would necessarily fail also. By much the same reasoning, if the substitution was to a *postumus* ('if a son is born to me let him be heir and if he becomes heir and dies under puberty let Seius be heir'), and if such son was ultimately born but died in his father's lifetime, the substitution failed, for the condition on which Seius had been appointed heir could not be fulfilled. After Marcus Aurelius, unless the testator expressly provided otherwise, every *pupillaris substitutio* was double, *i.e.* both *vulgaris* (*i.e.* if my son fail to become heir) and *pupillaris* (*i.e.* if he become heir and die *impubes*), for the Emperor enacted that the one should imply the other.

Suppose that by a *substitutio pupillaris* Seius has been appointed heir as substitute to the testator's infant son Balbus. It was obviously to the interest of Seius that Balbus should die under fourteen, and it was therefore usual to take measures to

guard against treachery. If Seius were substituted to Balbus — (a) if Balbus failed to become his father's heir, or (b) if he became heir and died under puberty — there would be, at first sight, no objection to substituting Seius on the first event in that part of the will which would be opened at the father's death, for only then and not before would it be known whether Balbus were heir and Seius substitute. When this course was adopted the other substitution (*i.e.* of Seius to Balbus if Balbus, having become heir, died under fourteen) would be written in later tablets, annexed to the will, but tied up and sealed as a separate document, and the earlier part of the will would contain a direction that the later tablets were not to be opened so long as Balbus was alive and under age. But Gaius tells us that it was much safer to make both substitutions in the later tablets, because Seius would probably guess that if he was appointed substitute in the one event he was also substitute in the other. There would be no practical inconvenience in this course, because, if, at the testator's death, Balbus had already died and so failed to become heir, the later tablets could be opened at once without danger.

(c) *Substitutio quasi pupillaris*. Justinian enabled an ancestor having any insane descendants (although over puberty) to substitute persons as heirs to them. It could previously have been done only on petition to the Emperor. This kind of substitution differs from *substitutio pupillaris* in that — (i) the right is not confined merely to a *paterfamilias*, but belongs even to a maternal ancestor; and (ii) the substitution can only be made in favour of sane descendants of the insane persons. If there were none, then sane issue of the ancestor making the will would take; failing which, it could be in favour of anyone. On the analogy of the *substitutio pupillaris* such substitution became void if the person in question recovered his mental capacity, and the substitution did not regain effect if he went mad again. If a descendant were incapable of making a will for any reason other than insanity, the ancestor could only make a *quasi pupillaris substitutio* for him by special licence from the Emperor.

4. Legacies

An ordinary will at Rome would contain — after the disherisons, the institutions and the substitutions — the appointment of tutors for infant children (and, under the old law, for

the testator's wife) and such legacies and *fideicommissa* as the testator imposed upon his heir or heirs. Legacies are therefore dealt with here and are followed by a description of *fideicommissa* in order to complete the account of the contents of a normal *testamentum*. A legacy differs from the institution of an heir or heirs inasmuch as an heir is appointed to succeed to the whole estate (*hereditas*) of the testator or some definite fraction of it, e.g. to one-third of all the rights and obligations of the testator. A legacy, on the other hand, is not an instance of universal succession, it is a mode (like *traditio*) of acquiring *res singulae* (as both Gaius and Justinian admit) and is only discussed in this place, instead of with the other methods of acquiring *res singulae*, on the ground of convenience, i.e. because legacies are only found in connexion with wills. A legacy, accordingly, is a gift to a person named in the will (or codicil) of some specific thing or things and charged on the *heres*. Usually the thing is a *res corporalis*; e.g. a horse or furniture, but not necessarily so, for it may be the release to a debtor of a debt owed to the testator, or it may be a gift of a right the testator had to receive payment from a third person, or it may consist of an obligation to do something (e.g. to build a house for the legatee) imposed upon the *heres*. Justinian defines a legacy in general terms: *Legatum itaque est donatio quaedam a defuncto relicta*. Ulpian adds that it must be imperative in form, if precativum it will amount only to a *fideicommissum*. The subject may be considered under the following heads —

- (a) How a legacy was given.
 - (b) What could be so given.
 - (c) The construction of legacies.
 - (d) Restrictions upon the total amount a testator could so bequeath.
 - (e) How a legacy might fail.
- (a) How a legacy could be given.
- Gaius tells us that originally a legacy was valid only if given in one of four ways, either —
- (i) *Per vindicationem*, or
 - (ii) *Per damnationem*, or
 - (iii) *Sinendi modo*, or
 - (iv) *Per praeceptionem*.

(i) A *legatum per vindicationem* was created by the use of the words '*do lego*' ('I give and bequeath') or either of them, the full form being, if, e.g., the legatee is Titius and the legacy is of a slave: *Titio hominem Stichum do lego*. By the time of Gaius, besides words of direct gift, a direct instruction to the legatee to take the legacy (e.g. *sumito*, *capito* or *sibi habeto*) was just as effective. This form of legacy operated as a direct gift to the legatee, i.e. did not involve the heir's handing it over to the legatee, and therefore, immediately the will came into operation by the heir's entry, the legatee as owner could bring a real action (*vindicatio*) for the legacy, whether in the hands of the heir or of some third person. By this method, however, a testator could only bequeath things which belonged to him *ex iure Quiritium* both when he made the will and at the moment of his death; the only exception being in respect of *res fungibiles*, for which ownership at death was enough. Where the same thing was given in this way to two or more persons, whether jointly (*coniunctim*) or in separate bequests (*disiunctim*), each took a share, and, if any legatee failed to take, his share accrued to the other legatees. According to the Sabinians the legacy vested in the legatee as soon as the heir entered, but the legatee could refuse to accept it; but the Proculians held it did not vest till the legatee assented. In the end the Sabinian view prevailed. If the legacy was conditional, the Sabinians held that the ownership was in the heir meanwhile; the Proculians maintained it was a *res nullius*, but the former view seems to have gained acceptance. This would enable an action to be brought — by the *heres* — for any wrong to the *res* in the meantime, but on the satisfaction of the condition the legatee's ownership would be partially retrospective, so that dealings by the heir in the interim were avoided.

(ii) A *legatum per damnationem* arose where the words used were '*damnas esto*', e.g. *Titio heres meus Stichum dare damnas esto*, and, as the expression suggests, this implied not a direct gift of the thing to the legatee, but a personal obligation which was cast upon the heir to do something for the legatee's benefit. The legatee accordingly had an action (*actio ex testamento*), not to claim the thing, but against the heir to make him carry out the duty which the testator had imposed. Originally, the duty being raised by the words '*damnas esto*', it gave the legatee the powerful *legis actio* remedy of *manus iniectio* against

the person of the heir, and a consequence of this was that denial by the heir of liability for this type of legacy always rendered him liable for double damages. In classical times (when *manus iniectio* had disappeared) any direction to the heir compelling him to benefit the legatee (e.g. '*dato*', '*facito*', '*dare iubeo*') had exactly the same effect as '*damnas esto*'. To discharge his obligation the heir had, if the thing was a *res Mancipi*, to transfer it to the legatee by *mancipatio* or *cessio in iure*, if a *res nec Mancipi*, by *traditio*, though, of course, if the *res* was *res Mancipi* and the heir merely made *traditio*, the legatee ultimately acquired *dominium* by means of *usucapio* in the usual manner. The peculiar advantage of this form of bequest was that the testator could give by it not merely his own property, but (a) what belonged to the heir or a third person (*res aliena*); in which latter case the heir was bound to buy and convey it to the legatee; (b) what would only come into existence at some future time, e.g. future crops or a child to be born of some slave woman; or (c) the testator might direct the heir not merely to hand over something to the legatee but to do some act for him, e.g. build him a house. If the same thing was given *per damnationem* to two or more persons *coniunctim*, each was entitled to a share, but if the gift to one failed there was no accrual to the others; the share lapsed, and, before the *lex Papia* (*post*, p. 287), continued to be the heir's property. If the same thing was given *disiunctim* the whole legacy belonged to each legatee, so that the heir was bound to give the thing to one and its value to the other or to each of the others.

(iii) A *legatum sinendi modo* was a modification of the last form, the words being *damnas esto sinere*, e.g. '*Heres meus damnas esto sinere Lucium Titium hominem Stichum sumere sibi que habere*'; and here, also, the remedy of the legatee was a personal action against the heir. This form, however, called on the heir merely to permit the legatee to take something, and thus, despite the use of '*damnas esto*', there was no liability to *manus iniectio* or for double damages on denial. Gaius tells us that a legacy of this sort was better than one given *per vindicationem*, but not so good as one *per damnationem*; for by this method a testator could give not only his own property but his heir's (which was impossible *per vindicationem*), but could not (as he might *per damnationem*) bequeath a *res*

aliena. Moreover, as regards the heir's property, probably only that which was owned by the heir at the testator's death could be left in this way, though a minority view allowed the heir's subsequent acquisitions to be affected. Since the heir was not bound *dare*, but only *sinere*, some jurists thought that the heir could not be compelled to make a formal transfer to the legatee (e.g. by *mancipatio*), but that it was enough if he allowed the legatee to take it. If a legacy was given *sinendi modo* to two or more persons *disiunctim*, some jurists thought that the whole belonged to each legatee, as in *legatum per damnationem*, but others considered that once one legatee had been allowed to take the thing the obligation of the heir was at an end; the heir, it was argued, was only bound to 'permit'; therefore, if after one legatee had obtained the legacy some other made a claim, the heir could answer that he neither had the thing, so as to be able to 'let' the claimant 'take it', nor was it by reason of anything like fraud on the heir's part that the claimant could not get what was left him.

(iv) A *legatum per praeceptionem* was created by the word *praecipito*, e.g. '*Lucius Titius hominem Stichum praecipito*'. Since *praecipito* means literally 'let him take before', the Sabinians held that a legacy could only be given in this way to one of two or more co-heirs who was to take some specific item of the *hereditas* before dividing the estate up. The Sabinians, therefore, considered that a legacy given *per praeceptionem* to any person but a co-heir was invalid and, Julian dissenting, not even cured by the *S.C. Neronianum* (*infra*); further, that a co-heir to whom such a legacy was given could only obtain it by the heir's remedy, the *iudicium familiae erciscundae*; and that, since nothing save what belonged to the *hereditas* could be sued for by this action, a testator could not bequeath *per praeceptionem* anything save his own property, the only exception being where the thing bequeathed had originally been the testator's, but had been mortgaged to a creditor by a *mancipatio fiduciae causa*. The Sabinians held that in such a case a *legatum per praeceptionem* gave the legatee a right to require the other heirs to pay the creditor, who would then mancipate the property to the legatee. The Proculians, on the other hand, held that '*prae*' was superfluous, and that, therefore, a legacy given in this way was, in effect, a legacy *per vindicationem*, and so possible even to a third

person, whose remedy would be a real action for its recovery (*vindicatio*). According to Gaius, the Proculian view was confirmed by Hadrian. It differed from a legacy *per vindicationem* in that the property need not be held by quiritary title or could have been acquired after the making of the will. According to both schools, a legacy *per praeceptionem* to two or more persons, whether *coniunctim* or *disiunctim*, entitled each to an equal share, as in the case of a legacy *per vindicationem*.

Even in the time of Gaius these formulas had lost much of their former importance by virtue of the *S.C. Neronianum* (A.D. 64), the exact meaning of which is doubtful, but which seems to have enacted that if a legacy were in danger of failing because the testator had used inappropriate words, it should be treated as if given *optimo iure*, i.e. *per damnationem*. If, therefore, to take an example, a testator gave a *res aliena per vindicationem*, the *S.C.* saved the legacy, because it was regarded as given *per damnationem*; another instance (given by Julian) is of a legacy given *per praeceptionem* to a stranger. On the other hand, if the legacy was in danger of failing because of some personal defect in the legatee (e.g. he was a *Latinus Iunianus* or a *peregrinus*), the *S.C.* had no application, and it would seem that even after the *S.C.* the Latin language still had to be used in a will. Constantius II, however, enacted (A.D. 339) that any words should thenceforth suffice, whether Latin or Greek, and Justinian placed all legacies, however given, on the same footing, and enacted that all advantages enjoyed by *fideicommissa* should be thenceforth enjoyed by legacies, and *vice versa*. Gifts to more than one legatee were now treated as those *per vindicationem* had been previously. If the property belonged to the testator the legatee could sue for it by a real action, whether it was in the hands of the heir or of a third person; and whether the legacy belonged to the testator or not, the legatee had his personal action against the heir; the rights of the legatee being further secured by a *tacita hypotheca* over all the property which the heir himself received from the inheritance.

(b) What could be given as a legacy.

Speaking generally, apart from *res extra commercium*, legacies of which were totally void, however given, any *res*, whether *corporalis* (e.g. a slave) or *incorporalis* (e.g. a release

from debt), could be given as a legacy, but the following cases require special notice —

(i) A legacy might be of a portion of the *hereditas* itself, e.g. one-eighth of all the rights and obligations of the testator. A legacy of this sort was called *legatum partitionis*, because the legatee shares with the *heres*, and the legatee himself was known as *legatarius partiarus*. According to the theory of the *ius civile* it was impossible to carry out the intention of the testator literally, because the only legal manner by which a share of the *hereditas* could be given to a person was by making him heir. The result which the testator wished therefore could not, at law, be effected, and what was done was (in effect) as follows — A calculation was made and, in the case supposed, it would be ascertained what constituted an eighth part of the testator's corporeal property (e.g. land, slaves, furniture), and what an eighth of his incorporeal rights (e.g. to have debts or damages paid to him), and what an eighth of his liabilities (e.g. for debts or damages). Then the heir transferred (by *mancipatio* or *traditio*) the eighth part of the land, etc., to the *legatarius partiarus*, and covenants were entered into between the heir and legatee (*stipulationes partis et pro parte*), the heir engaging to make over to the legatee one-eighth part of debts and damages due to the testator, the legatee to indemnify the heir against the same proportion of the liabilities. Under Justinian this type of legacy became merged into *fideicommissum hereditatis*, and so the machinery became obsolete.

(ii) Originally a testator could impose upon his heir (*per damnationem*) the obligation to transfer to a legatee the property of a third person (*res aliena*), or, if the heir could not buy it, to pay the legatee its value, but by Justinian's time this had been modified, for a rescript of Antoninus Pius provided that the legacy of a *res aliena* had no effect unless the testator knew that the thing was not his own property, and the burden of proof was upon the legatee.

(iii) If the legacy was of some property mortgaged to a third person at the date of the will, the heir had to redeem the mortgage for the benefit of the legatee, but after a rescript of Severus and Caracalla only if the testator was aware of the mortgage.

(iv) *A* gives a legacy (e.g. of land) to *B* and afterwards sells

or mortgages it. The effect was disputed in the time of Gaius : some jurists thought that though the legacy was still due the legatee could be defeated by an *exceptio doli*. Celsus, however, considered the legacy ought to be paid if the testator did not intend to revoke the legacy when he sold or mortgaged, and this opinion was confirmed by a rescript of Severus and Caracalla.

(v) *A* gives as a legacy to *B* a *res aliena* belonging to *C*. By the time when the legacy becomes due *B* has already obtained the *res*. If *B* bought the thing he can claim the value from the heir, but he cannot if he obtained it gratuitously (*causa lucrativa*), e.g. by a gift *inter vivos* from *C* or under *C*'s will. In like manner, if *A* leaves *C*'s farm to *B*, and before the legacy is due *B* acquires a usufruct in the farm by way of gift, and buys the *dominium*, *B* can sue the heir for the value of the farm but will only recover what he gave for the *dominium*.

(vi) A legacy of what already belongs to the legatee is invalid (*inutile*), and remains so though he parts with it before the legacy becomes due, for, by the *regula Catoniana*, a legacy which was invalid when the will was made cannot be cured by after events. However, if the legacy is conditional and the *res* has ceased to belong to him before the condition is satisfied, the legacy is valid because the rule does not apply.

(vii) *A* gives *B* a legacy of *A*'s own property, thinking, by mistake, either that it is a *res aliena* or that it belongs to *B*. The legacy is good.

(viii) If the legacy is a release from a debt (*legatum liberationis*) the heir cannot recover the money from the debtor, who, if he wishes, can compel the heir to release him formally, e.g. by *acceptilatio*.

(ix) Conversely, *A*, who owes *B* fifty *aurei*, gives *B* the money by his will. The legacy (*legatum debiti*) is invalid, for *B* gets no benefit by the legacy since he can sue the heir as a creditor of the estate. But if *A* owes the money conditionally but gives it absolutely, or before it is due, the legacy is good.

(x) *A* gives his wife, *B*, her *dos* as a legacy (*legatum dotis*). If *A* has actually received the *dos* the legacy is good, because *B* has a better remedy for its recovery as a legacy than she would by an action founded on the *dos*. If he has never received it, then if the *dos* is bequeathed in general terms the legacy is void for uncertainty, but if *A* said, 'I give my wife fifty *aurei* which she brought me as *dos*', or 'the house I live

in, which is mentioned in our marriage settlement', the legacy is good, although no *dos* or marriage settlement had in fact been given or executed.

(xi) If the legacy is of a debt due to the testator (*legatum nominis*) the heir must sue for the benefit of the legatee, unless the legacy has become void because the testator received payment in his lifetime.

(xii) *Legatum generis* was where the testator gave a *res non fungibilis* without specifying it in definite terms, e.g. 'I give Titius a slave'. If the estate comprised such an object the legacy was valid and Titius had the choice, but he could not choose the best. In classical law Titius had the choice if the legacy was *per vindicationem*, but if *per damnationem* the heir could choose, but not the worst. However, the fetters on the freedom of choice may have been post-classical.

(xiii) *Legatum optionis* is akin to the *legatum generis*, but the legatee is expressly given the right to make a choice (e.g. 'I give Titius any one of my slaves he may choose') and he may choose the best of the *genus*. Formerly, if Titius died before making the choice the legacy failed, but Justinian extended the right to his heir. Also, before Justinian, if there were several legatees to whom a *legatum optionis* was given and they were unable to agree, the legacy was void. Justinian provided that they (or the heirs of one legatee under Justinian's extension) should draw lots.

(c) The construction of legacies.

(i) A legacy could only be given to a person with whom the testator had *testamenti factio* and, until Justinian, could not be made in favour of an *incerta persona*, e.g. 'whoever shall come to my funeral'; but a gift to one of an ascertained class was good, e.g. 'to any one of my *cognati* now alive who shall marry my daughter'. Among *incertae personae* were reckoned *postumi alieni*, i.e. all *postumi* except persons who on birth become *sui heredes* of the testator (e.g. a grandchild begotten to a son who has been emancipated would be a *postumus alienus* in this sense). By Justinian's time a *postumus extraneus* conceived at the time of the testator's death could take a legacy and even be instituted heir, whilst the Code allowed *incertae personae* to take under a will except as heirs. Municipalities and other corporate bodies were *incertae personae* and could

not until the fifth century A.D. be instituted heirs without special imperial permission ; they could, however, take legacies even in classical law.

(ii) *A* gives a legacy to *B*, who is the slave of *C*, *A*'s heir. The Sabinians considered this a valid legacy if given conditionally upon the slave's being free when the legacy was due, invalid if unconditional. The Proculians considered it bad in either case, because of the *regula Catoniana*. In Justinian's time the Sabinian view was the accepted one, on the ground that the *regula Catoniana* did not apply to conditional legacies.

(iii) Conversely, if *A* appoints *B*'s slave, *C*, heir and gives *B* a legacy, then if *C* remains in *B*'s power and enters upon the *hereditas* on his behalf, the legacy fails, because *B* cannot owe a legacy to himself. But if *C* is manumitted or sold to another master in *A*'s lifetime, *B*'s legacy is valid.

(iv) A mere mistake by the testator as to the legatee's *nomen*, *cognomen*, or *praenomen* had no effect if it was clear whom he meant.

(v) *Falsa demonstratio non nocet* ; e.g. 'I give as a legacy to my slave Stichus, whom I bought of Seius'. This was a good legacy, although the *demonstratio* or description was inaccurate because the testator, in fact, bought Stichus from Titius. Another example has been given already in connexion with the *legatum dotis*.

(vi) *Falsa causa non nocet* ; e.g. 'I give a legacy to Titius because he managed my business in my absence'. If Titius never did so, he still takes the legacy in spite of the testator's mistake as to the reason (*causa*) for it, unless the reason amounts to an actual condition ; e.g. 'I give my slave to Titius if he shall have managed my affairs'.

(vii) Gaius calls invalid a legacy to operate after the heir's death or on the day before he dies, but strangely enough one to take effect 'when he shall die' was valid. Justinian allowed all three. Gaius also states the classical rule that a legacy *poenae nomine*, i.e. one calculated to coerce the heir into some act or abstention (e.g., 'if my heir gives' — or 'does not give' — 'his daughter in marriage to Balbus, then let him give 1000 *aurei* to Seius'), was void. Justinian reversed this rather anomalous rule, except where the condition was impossible, illegal or immoral.

(viii) If the thing which is given as a legacy is lost or de-

stroyed the loss falls upon the legatee, unless it was occasioned by the fault of the heir. Hence if *A* gives *D*'s slave as a legacy to *B* and *D* manumits the slave before the legacy is due, the legacy fails unless *D* was persuaded to manumit the slave by *A*'s heir, in which case, of course, the heir must compensate *B*. If *A* makes *C* his heir and gives *C*'s slave to *B* as a legacy, and *C* manumits the slave, he must compensate *B*, whether or not he knows of the legacy when he manumits.

(ix) *A* gives as a legacy to *B* 'a female slave with her offspring'; if the mother dies, *B* still takes the offspring. So too, if the legacy is of 'a principal slave and his assistants' (*vicarii*) and the principal slave dies.

(x) *A* bequeaths to *B* *A*'s slave Stichus 'with his *peculium*'; the legacy of the *peculium* fails with the legacy of the slave, e.g. if the slave dies before the testator, for the *peculium* is merely accessory to the slave, and the rule is that the accessory follows the principal.

(xi) Land is given as a legacy 'with its accessories', e.g. farm implements. If the land is sold and the testator intended thereby to revoke the legacy, *B* does not take the accessories.

(xii) If the legacy is of a flock which afterwards is reduced to a single sheep, e.g. by death, the legatee can claim it, although, of course, it is no longer a flock.

(xiii) Any additions to a flock or a building after the date of the will belong to the legatee.

(xiv) If a slave is given his freedom by will, this does not of itself carry with it a legacy of his *peculium*, although had the slave been manumitted by his master *inter vivos* he would have taken his *peculium* unless the master expressly deprived him of it. But on manumission by will the slave may take his *peculium* if it appears, either expressly or by implication, that the master so intended. If the slave is given his *peculium* as a legacy, together with his freedom, he takes not only the *peculium* as it stood at the testator's death but all additions to it between the death and the heir's entry.

(xv) If the *peculium* is given as a legacy to *C*, a third person, *C* takes it as it stood at the death of the testator, but with regard to additions made between the death and the heir's entry *C* only gets acquisitions made by means of something forming part of the *peculium*.

(xvi) *Dies cedit* — *dies venit*. The former is the term

applied to the time when the legatee's right to the legacy comes into existence, the latter (*dies venit*) when the right can be first enforced by action. Originally *dies cedit* on the death of the testator, if the legacy was unconditional; and though the *lex Papia Poppaea* made the date the opening of the will, Justinian restored the old date. If the legacy was conditional, *dies cedit* when the condition was fulfilled. *Dies venit* when the heir made *aditio* as a general rule, but the date might be later, e.g. if the testator so declared, or if there were a condition to the legacy which was still unfulfilled.

(d) Restrictions on the amount of legacies.

The generosity of a Roman testator in the matter of legacies might easily prejudice the legatees rather than the heir, because if a testator left so many legacies as to render the estate (or rather the residue) worthless, the heir might refuse to enter, and in such case the will and the legacies fell to the ground. Moreover, the heir, if, e.g., an agnate, might be entitled to the property as on an intestacy, taking it, of course, free from all legacies. To prevent an intestacy, three several enactments were passed, of which only the last succeeded in its object. The first law, the *lex Furia* (200 B.C.), enacted that no legatee (save near relatives) could claim more than 1000 *asses* as a legacy, the second, the *lex Voconia* (169 B.C.), that no legatee should take more as a legacy than the heir got out of the estate. But obviously a testator could satisfy the provisions of either law, and yet, by leaving a sufficient number of legacies, render the estate practically worthless in the hands of the heir.

Finally the difficulty was solved by the *lex Falcidia* (40 B.C.), which required that the total amount given in legacies should never exceed such a sum as would allow the heir to keep at least a fourth part of the *hereditas*. In other words, whatever the amount given in legacies, the heir must get at least his fourth (*quarta Falcidia*), and, if necessary, the legacies diminish. If there are two or more heirs, each gets a fourth of his share of the *hereditas*, whatever it may be, and the calculation is made for each heir separately: e.g. *A* institutes *B* heir to half of his estate, *C* to the other half; *A* imposes no legacies on *B*, but so many on *C* as to exhaust or nearly exhaust his share; as to *B*, the *lex Falcidia* is unnecessary; it applies, however, to *C*, who will get one-fourth of his half, and the legatees will only be

entitled to payment of their legacies out of the remaining three-fourths of the half-share, the legacies abating proportionately.

In order to ascertain the value of the *hereditas*, an estimate was made of it *as at the testator's death*. From the gross value of the estate, deductions were made in respect of — (i) the expenses of winding up the estate; (ii) the debts of the testator; (iii) the value of the slaves who had been freed; (iv) the funeral expenses. What was left was the 'net' *hereditas*, and of this the heir had to receive at least one-fourth, the remaining three-fourths being divided up among the legatees, if the testator had given them as much. If he had given less, of course, there was no need for the *lex Falcidia*, for the heir obtained more than one-fourth under the will. When the legacies had to be reduced the reduction was proportionate: e.g. the estate is worth 400 *aurei* net; *A* is heir, and *B, C, D* and *E* each has a legacy of 100 *aurei*, thus exhausting the estate; the *lex Falcidia* automatically reduces each legacy to 75 *aurei*, making 300 *aurei* in all, and *A* accordingly gets 100 *aurei*, being his *quarta Falcidia* of the *hereditas*. If a legacy is made *per vindicationem* the legatee has a *vindicatio* for only the proportion of the *res legata*. If a *res legata* is incapable of division the legatee has to pay the heir the proportionate amount of its value.

Since the value is fixed at the testator's death, it is the heir who benefits or loses by the estate's subsequently increasing or diminishing in value: e.g. *X* makes *A* heir and gives 100 *aurei* to *B* as a legacy; the net value of the estate at *X*'s death is 100 *aurei*, and *B*'s legacy is cut down to 75 *aurei*; if, however, the estate is worth 500 *aurei* when *A* enters (e.g. as a result of the birth of slaves and cattle), *A* benefits, *B*'s legacy remaining at 75 *aurei*. Conversely, *A* is heir, *B* is legatee of 75 *aurei*, and the net estate at death is ascertained at 100 *aurei*. *B* will be entitled to his 75 *aurei*, although before *A* enters the value of the estate falls to 75 *aurei* or less (e.g. by the death of a slave). But of course *B* will not get his legacy at all unless *A* enters, and *B* will probably, therefore, come to some arrangement with *A*, so as to make it worth *A*'s while to do so.

The *lex Falcidia* never applied to the will of a soldier, and Justinian enacted that it should have no application where the testator himself expressly so provided. Further, in Justinian's

time the benefit of the *lex* was lost to the heir when he renounced the right or was deprived of it for neglecting to make an inventory according to Justinian's provisions or for attempting to defraud the legatees or where he accepted only under compulsion. Finally, certain kinds of legacies were, exceptionally, unaffected by the *lex Falcidia*, e.g. gifts to charities.

(e) How a legacy might fail.

(i) If the will which bequeathed it was void or failed to take effect, e.g. by the *heres* refusing to enter. However, if the *heres* refused because he could take free on intestacy or because he made an arrangement with the intestate heir, the praetor intervened and granted the legatees an action.

(ii) By express revocation (*ademptio*). In the time when the old formulas were necessary to give a legacy, such legacy had to be revoked in an equally formal manner, i.e. *contrariis verbis* (e.g. '*non do lego*'). But long before Justinian the revocation could be informal; e.g. by the disposition's being intentionally erased from the will or by any declaration (by will or codicil) that the legacy was not to take effect.

(iii) By implied ademption; e.g. — (a) alienation of the thing, unless the legatee could prove that the testator did not by alienation intend to revoke the legacy; (b) great enmity subsequently arising between the testator and legatee.

(iv) By the destruction of the subject-matter of the legacy.

(v) If the legatee lost the right to take; e.g. died before *dies cedit*.

(vi) By *translatio*; i.e. if the testator, by will or codicil, transferred the legacy from one person to another; e.g. '*hominem Stichum quem Titio legavi, Seio do lego*'.

(vii) Partially, by reason of the *lex Falcidia*.

(viii) By acquisition of the thing *ex lucrativa causa*, as explained.

(ix) By a legacy to a debtor of the exact amount of his debt.

(x) By the refusal of the legatee to accept.

It must also be noted that a legacy was a charge upon an heir: there could not be a legacy charged on another legatee.

5. *Fideicommissa*

The many formalities with regard to the institution of heirs and the bequest of legacies, coupled with the fact that

many persons, e.g. *peregrini*, were incapable of being instituted heirs or of being given a legacy, led, in the late Republic, to testators leaving directions to their heirs in favour of given individuals, which, though not binding at law, they hoped their heirs would feel bound in honour to carry out. The beginning of *fideicommissa*, therefore, was very like the early practice with regard to trusts in English law, and, as in the case of trusts, a time came when *fideicommissa* were made binding legally as well as morally. Justinian tells us that the Emperor Augustus ordered the consuls, in certain cases, to interpose their authority in order to enforce *fideicommissa* (and also *codicilli*, *ante*, p. 244) and that, since this measure proved popular, a regular jurisdiction soon came to be established over these hitherto informal bequests and a special praetor was appointed to deal with them and was called the *praetor fideicommissarius*. For brevity, the *fideicommissum* will here be loosely called 'the trust', the person upon whom it was imposed (*fiduciarius*) 'the trustee', and the person in whose favour it was imposed (*fideicommissarius*) 'the beneficiary'.

The following were the chief points of original difference between legacies and trusts —

(i) A legacy must be given in a formal manner: an informal declaration of intention, even a nod, might be enough to constitute a trust.

(ii) A legacy could not exist apart from a will: a trust could be imposed by will, but might also be placed upon a man's intestate heir, and it could also be put upon the heir of one's heir.

(iii) A legacy could be claimed by an ordinary action: whereas, even when trusts gained recognition, the action against the trustee was given by the *praetor fideicommissarius* in the exercise of his *extraordinaria cognitio*. It was called a '*petitio*' or '*persecutio*', not an '*actio*'.

(iv) Anyone might be the beneficiary under a trust, while a legatee might be disqualified, e.g. as not having *testamenti factio* or under various *leges*.

(v) Since the *lex Falcidia* applied only to legacies, a testator (once trusts were enforced) could, by a series of such trusts, instead of legacies, once more make his estate practically worthless in the hands of his heir.

(vi) A trust could be in Greek, a legacy only in Latin till the late Empire.

(vii) A legacy, like an *institutio*, could not be made to take effect from a certain date, nor to cease on a certain happening or day: a *fideicommissum* could evade these rules (e.g. 'when X, my heir, is dead I want my property to go to Y').

(viii) Delay by the heir in handing over a legacy did not entitle the legatee to interest and *interim* profits except in legacies *sinendi modo*: under a trust the beneficiary was always so entitled. (Where the legacy was *per vindicationem* the *res* was, of course, the legatee's from *aditio* so that the fruits were his from then also.)

(ix) Trusts could be made in favour of *incertae personae*, even to the extent of making a settlement for the benefit of several generations unborn.

(x) Trusts could originally be made *poenae nomine* (*ante*, p. 274).

(xi) A trust could be imposed on an heir, on a legatee, and even on a *fideicommissarius*, but a legacy only on an heir.

The trust was also useful for other testamentary provisions, e.g. for conferring liberty on a *servus alienus* or for ensuring a valid manumission when a slave reached thirty years of age.

In the course of time, however, while the strict rules of legacies became relaxed in favour of the principle of giving effect to the intention of the testator (e.g. by the *S.C. Neronianum*), the rules relating to trusts lost much of their elasticity. Peregrines were early forbidden to take under trusts. The *S.C. Pegasianum* (A.D. 70) not only extended the principle of the *lex Falcidia* to trusts, but enacted that *coelibes* and *orbi* who were disqualified from taking legacies by the *leges Iulia et Papia Poppaea* (*post*, p. 287) should be incapable of taking by way of trust, and under Hadrian *incertae personae* were declared incapable of benefiting by trusts. Junian Latins remained the only class of persons who could take under a trust but not on a legacy. Furthermore, it became settled that a trust *poenae nomine* was as void as such a legacy. Finally, under Justinian's legislation, trusts and legacies were placed upon the same footing and were given the same remedies, even the informality in the manner of bequest disappearing, for a trust had to be duly witnessed to be legally enforceable. If, however, the trust had not been duly witnessed, the rule was the same as that with regard to codicils: the beneficiary

might require the person upon whom he alleged the trust had been imposed to deny on oath the existence of the trust. If he refused the oath, he would have to carry out the trust. Moreover, Justinian fused all the remedies of legacy and trust. For the first time the beneficiary under the trust could have a *vindicatio* for any *res* left him as well as his action *in personam*.

A trust might be either of one or more *res singulae*, or of the whole *hereditas* or part of it.

A trust of *res singulae*. A man might request his heir (under his will or on an intestacy) or a legatee to give or do something for the use of the beneficiary, but no one could be so obliged to give more than he himself received; and where the trustee was the heir, he was entitled, after the *S.C. Pegasianum*, to keep — whatever the amount of legacies and trusts imposed upon him — at least a quarter of the *hereditas*, or if one of several co-heirs a quarter of his share of it. If the trust took the form of a direction to liberate a slave and that slave belonged to a third person, the trustee would be bound to buy and manumit him. If the master refused to sell, as he might if he himself had received no benefit from the person creating the trust, the gift of liberty was extinguished in the time of Gaius, but merely suspended under Justinian, because it might in the future become possible for the slave to be bought and freed. Even where the slave was owned by the person creating the trust, the slave did not become his *libertus*, but the *libertus* of the trustee who freed him. This was one of the few points of difference in Justinian's time between the operation of a legacy and a trust; for a slave directly freed by will became *orcinus*, *i.e.* the freedman of a deceased person, the testator, not of the heir.

A trust of the *hereditas*. *Fideicommissum hereditatis*. This sort of trust arose when a man directed his heir (whether testamentary or intestate) to hold the *hereditas* in trust (*i.e.* by way of *fideicommissum*) for some third person, so that really this third person (the beneficiary) was to succeed to the whole *hereditas*, the heir being merely a figure. The device was specially useful, and perhaps was first resorted to, where the beneficiary could not be the *ius civile* heir, *e.g.* was a *peregrinus*. At first, however, even when the legal validity of trusts came to be recognised, the transaction could not be exactly and

literally carried out, since the heir, though made trustee and though willing to execute the trust, could not divest himself of his heirship. The maxim *semel heres, semper heres* prevented anyone but the heir himself from suing the debtors of the estate and so realising it, and he was also the only person whom the creditors of the estate could sue. Accordingly a plan was adopted under which the beneficiary (*B*) was put *emptoris loco*, i.e. in the position of a purchaser of the estate. The heir (*H*), by a fictitious *mancipatio* (i.e. for a single coin), sold the *hereditas* to *B*, and, since *mancipatio* was inoperative to convey obligations, the sale merely vested in *B* the *res corporales* of the *hereditas*. *H* and *B*, therefore, entered into mutual covenants (*stipulationes quasi emptae et venditae hereditatis*), *H* to hand over to *B* the assets of the estate as and when he received them, and that, if necessary, *B* might sue the debtors of the estate in *H*'s name; *B* that he would reimburse *H* against claims made by creditors of the deceased. If the heir was asked to hand over part of the *hereditas* only, the transaction was like the proceedings where part of the estate was given as a legacy (*partitionis*); the sale (mancipation) would be limited, e.g. to half the *hereditas*, and the stipulations entered into would be *partis et pro parte*. Obviously the above plan might prove much to *H*'s disadvantage. Suppose *H* is asked to transfer to *B* the whole *hereditas*, and that, e.g., the corporeal items of the estate are worth 50 *aurei*, the debts due to it 100 *aurei*, and the debts owed by it 90 *aurei*. *H* transfers the land and other corporeal property to *B* and gets in and pays to him the debts due. *B* thus receives 150 *aurei* and may speedily lose them and the rest of his property in rash speculation. When, therefore, the creditors of the estate compel *H* to pay them he will be 90 *aurei* out of pocket, together with the money he spends in trying to enforce *B*'s covenant of indemnity.

To avoid this possibility, and to abolish the clumsy process above described, the *S.C. Trebellianum* was passed (c. A.D. 57), and this *S.C.* (as modified by the *S.C. Pegasianum*, A.D. 70) governed the proceedings in the time of Gaius, when *B* was sometimes *heredis loco* (viz. when the *S.C. Trebellianum* applied), sometimes *legatarii loco* (viz. when the *S.C. Pegasianum* was invoked). The *S.C. Trebellianum* provided that, as soon as *H* assented, even informally, to the vesting of the *hereditas* in *B*, all actions, which might have been brought by or

against *H* should be allowed to and against *B*; and thenceforth the praetor, acting on the *S.C.*, permitted *B* to sue and be sued on *actiones utiles* as if he were heir; hence *B* is termed by Gaius *heredis loco*. *B*, it is true, was only heir in 'equity', but he had all the practical advantages of heirship; and although the *S.C.* did not repeal the letter of the maxim *semel heres, semper heres*, it destroyed its reality, for if *H* were sued by the creditors after the transfer, he could defeat them by pleading the *exceptio restitutae hereditatis*, or, as it was sometimes called, the *exceptio S.C. Trebelliani*.

Since, however, a trust depended as much as a legacy on the heir's making *aditio*, it is obvious that, where *H* was asked to transfer the whole or the greater part of the *hereditas*, he might well refuse, as himself receiving no benefit, and the trust accordingly might wholly fail. To remedy this, the appallingly drafted *S.C. Pegasianum* was passed, which allowed the heir (as under the *lex Falcidia* with regard to legacies) to retain a fourth part of the *hereditas*, and the principle was extended also to cases where the heir was only one of several, where, of course, he retained one-fourth, not of the whole *hereditas*, but of the share to which he had been instituted. The *S.C.* further provided that, if *H* declined to make *aditio* (e.g. because he thought the *hereditas* was *damnosa*), *B*, the beneficiary, might obtain an order from the praetor to compel him, and in such case *H* neither gained nor lost; the transfer was deemed to be governed by the *S.C. Trebellianum*, *B* could sue and be sued *heredis loco* and *H* could plead the *exceptio restitutae hereditatis* when sued.

The *S.C. Pegasianum* did not repeal the earlier statute, but modified it, and it was only when less than a quarter of the estate was left to *H* that the *S.C. Trebellianum* had no application, and in this case the relations between *H*, *B* and the debtors and creditors of the estate were as under the old system before the *S.C. Trebellianum*. The statement made by Gaius, therefore, that *B*, formerly *emptoris loco*, was in his time *aliquando heredis loco*, *aliquando legatarii*, becomes intelligible. *B* was *heredis loco* when the *S.C. Trebellianum* gave actions to and against him, and protected *H* by the *exceptio restitutae hereditatis*, viz.: (i) when *H* was not requested to transfer more than three-quarters of the *hereditas*; (ii) when *H* refused to enter and the praetor compelled him. *B* was

legatarii loco when less than a quarter of the *hereditas* was left to *H*. Then if *H* entered and relied upon the *S.C. Pegasianum* to secure his fourth, there was a mock sale of the part transferred to *B*, and stipulations *partis et pro parte*, as in the case of *legatum partitionis*; if *H* did not rely upon *S.C. Pegasianum*, there was a sale of the whole estate, and stipulations *quasi emptae et venditae hereditatis*. It will be noticed that, though *B* is spoken of as *legatarii loco* in both cases, the expression is more apposite to the first case, *viz.* where *H* relied on the *S.C.* for his fourth; *B*'s position being then exactly *legatarii loco*, *viz.* a legatee to whom a share of the *hereditas* had been bequeathed. In the second case (where the stipulations were *quasi emptae et venditae hereditatis*) *B*'s position, though more like that of a legatee than that of an heir, might equally well be described as *emptoris loco* as under the system prior to the *S.C. Trebellianum*.

One more point in relation to the *S.CC.* must be noticed before passing to Justinian's changes. *H* might be asked to hand the *hereditas* to *B* after reserving in his own favour, not a definite part of the *hereditas*, but some specific thing or things, *e.g.* land or slaves. In this case, however valuable the specific gifts might be, and even though they amounted to the greater part of the estate, all the actions passed to and against *B* when *H* assented to the transfer of the *hereditas*, and *H* escaped liability.

Justinian embodied the two *S.CC.* into one, retaining the advantages of each. The heir was to be entitled in every case to at least his fourth, if he wished to retain it, and the mock sale and stipulations were to be in every case unnecessary. The actions were to pass to and against the beneficiary in proportion to the share of the estate transferred to him; he was thus always made *heredis loco* so far as his share was concerned while the heir remained heir in proportion to the part he retained, *i.e.* to that extent actions lay for and against him. As under the *S.C. Pegasianum*, the heir who refused to enter could be compelled to do so, but at the same time he escaped all liability. As with the *lex Falcidia*, Justinian allowed the testator to exclude the heir's right to a quarter. He also drastically changed the rules relating to *incertae personae*. The situation as prior to Hadrian was apparently basically restored, so that family settlements became possible even to the extent

of tying up property in perpetuity. Ultimately he had to limit this power of a testator to four generations.

(C) *Testamenti Factio*

Testamenti factio has three aspects: (1) *testamenti factio activa* denotes the power to make a will, (2) *passiva* the capacity to receive benefits under one, while (3) a third kind of *testamenti factio* is the capacity to witness a will.

1. *Testamenti factio activa*

Only persons who had the *ius commercii* and were under no disability could make a will, and in ordinary cases they had to possess the right not only at the date of their will, but also at death. A slave and a *filiusfamilias* were incapable, being *alieni iuris*, except that (i) a public slave of the Roman people might dispose by will of half his *peculium*; and (ii) a *filius* could dispose by will of his *peculium castrense* while on military service, and, after Hadrian, at any time, and under Justinian, of his *peculium quasi castrense*; for in relation to them, he was regarded as an independent proprietor. An *impubes* was incapable, because, although he might be *sui iuris*, his tender years disabled him, and the same lack of capacity attached to a *furius* and also to a *prodigus* who had been forbidden by the praetor to manage his affairs. A *Latinus Iunianus*, not having the *ius commercii mortis causa*, a *dediticius*, having no *commercium* of any kind, and a person made *intestabilis* by the Senate's decree (e.g. because condemned *ob carmen famosum*) were equally incapable of testamentary disposition. If a Roman citizen was captured in war and so became a slave, he lost capacity, and any will made during captivity was invalid, even though afterwards he escaped and returned to Rome. But if he had already made a will before capture, it remained good, whether he returned or not. If he returned, it was good by the *ius postliminii*, i.e. by the fiction that he had never been captured; if he did not return, but died in captivity, by the *fictio legis Corneliae*, which assumed that a Roman citizen dying in captivity had never been taken prisoner at all, but had died at the moment of capture.

In the time of Gaius persons who were deaf or dumb were incapable of will-making: the former because they could not

hear, and the latter because they could not utter, the nuncupative part of the *mancipatio*; but Justinian removed the incapacity, except in the case of those who had been deaf-and-dumb from birth. A blind man, it would seem, could always make a will, but in Justinian's time special formalities were necessary; for besides the usual seven witnesses, a notary, or if one could not be found, an eighth witness was necessary, and the will had to be read aloud. The position of women under *perpetua tutela* with regard to will-making has been already discussed (*ante*, p. 142).

2. *Testamenti factio passiva*

Testamenti factio passiva is the right to be instituted heir by, or to be given a legacy under, a will, and it was necessary that the person in question should possess it, not only at the date of the will and the time of the testator's death, but also at the date of the entry (*aditio*). *Testamenti factio passiva*, however, was possessed by many persons to whom the right to make a will was denied, for everyone who was either a citizen or subject to the *potestas* of one could take under a will, even though under incapacity; e.g. in spite of being *furiosus* or *impubes*. The chief examples of those unable to benefit by a will, therefore, were *peregrini*, *dediticii*, persons pronounced *intestabiles* and persons disqualified by statute on the ground of public policy; e.g. in the time of Justinian heretics, apostates and the children of persons convicted of treason. As already seen, *incertae personae* were incapable, but various relaxations, especially in respect of *postumi*, were gradually made. By the *lex Voconia* a woman could not be instituted heir by a testator whose fortune, according to the *census*, amounted to or exceeded 100,000 *asses*, but this disqualification became obsolete early in the Empire, owing to the *census*' ceasing to be taken.

Besides having to have *testamenti factio*, anyone claiming under a will had to have *ius capiendi*, the right to take. Usually this would be implied in *testamenti factio passiva*, but the distinction arose very importantly in the early Empire. By the *lex Iunia* a Junian Latin, although having sufficient *commercium* to have *testamenti factio passiva*, was denied the *ius capiendi*. This meant that his institution or a legacy to him was validly made, but he could not take advantage of it unless

he rid himself of the disability by attaining citizenship before the time for *aditio* had passed. In contrast, a peregrine had no capacity at all and, even if he was made a *civis*, whether before or after the testator's death, any disposition to him was void. The other main example of an absence of *ius capiendi* arose in respect of citizens out of the *leges Iulia et Papia Poppaea*, part of Augustus' legislation to encourage marriage and advance the birth-rate. The *lex Iulia* took from the *coelebs* (i.e. an unmarried person, male over twenty-five, female over twenty) the capacity to receive benefits under a will unless the testator were related to him within the sixth degree, or unless the *coelebs* married within 100 days from the date when the contents of the will were known. Under the *lex Papia Poppaea*, *orbi* (i.e. persons who, though married, had no children living) were permitted to take only half the benefits conferred upon them by will, unless the testator was, as in the case of the *lex Iulia*, a near relative. The legislation apparently imposed restrictions of various sorts on others, e.g. upon widowers with children. The effect of the statutes was to cause many institutions to become *caduca* (lapsed). Previously, a gift that was *caducum* went by accrual to the heir or to co-heirs (e.g. where the donee died or refused the gift). However, the legislation provided new destinations for *caduca* whether the lapse was due to the statutes or not. The order of persons to take the lapsed share was —

(a) Ascendants and descendants of the testator, each to three generations (by virtue of their *ius antiquum*), provided that they were expressly benefited by the will, but whether or not they were married or had children ; in default of these —

(b) Such of the heirs as had children ; in default —

(c) Legatees who had children, except that where the legacy was a joint one the co-legatees having children took in priority to an heir with children ; and lastly —

(d) The public treasury (*Aerarium*) or, after c. A.D. 200, the imperial treasury (*Fiscus*).

Under Caracalla, classes (b) and (c) apparently lost their claim, so that heirs who were children or parents of the testator took ; or else the *Fiscus* took. The disqualification imposed upon *coelibes* and *orbi* by the above *leges caducariae* was altogether obsolete in Justinian's time, having been abolished by Constantine.

As already stated, the capacity to benefit under a will belonged not only to citizens, but also to those in the power of a citizen. If the superior were the testator himself the person under *potestas* might acquire for his own benefit; e.g. a *filiusfamilias* made heir by his father or a slave instituted heir with freedom. If the superior was someone other than the testator, the benefit given to the person in *potestas* accrued in the ordinary course to the *paterfamilias* or master: e.g. *A* appoints as heir *B*'s slave, *C*. This is a valid appointment if *B* has *testamenti factio* with *A*, and valid even though *B* is dead; but of course, when *C* enters *A*'s *hereditas* at the command of *B* or *B*'s heir he will do so for his master, who will thus get all the benefits accruing from heirship and also incur all disadvantages.

3. *Testamenti factio* as meaning the capacity to witness a will

The capacity to witness a will was only required at the time of the making of the will, and in the time of Gaius only those persons could be witnesses who were capable of taking part in the mancipation upon which the will was founded. Since no person could participate in the ceremony who was not a citizen above the age of puberty and under no incapacity, it follows that persons who were deaf, dumb, insane, slaves, women and children under *tutela* could not witness. Further, when Gaius wrote, since in theory the whole business was between the testator and the *familiae emptor*, no person in the *potestas* of either of those persons, or under the same *potestas*, was a valid witness. But the real heir, the legatees and their relatives were not excluded from being witnesses, though Gaius tells us that it is not desirable that the heir himself, his *paterfamilias*, and those subject to his *potestas* should be witnesses. Under Justinian, though the will was no longer made by means of a fictitious sale, a witness had still to have *ius commercii* and be free from incapacity; and Justinian tells us that neither women, children under puberty, slaves, dumb and deaf persons, insane persons, prodigals, nor persons declared *intestabiles* were competent witnesses. The *familiae emptor* had, of course, disappeared, but as under the old law, no person under the *potestas* of, or subject to the same *potestas* as, the testator, could be a witness; and the custom of which

Gaius disapproved, *viz.* that the heir and his relations were good witnesses, was abrogated by Justinian. Under his law, therefore, no person instituted heir, nor anyone in his *potestas*, nor his *paterfamilias*, nor his brother under the same *potestas*, could be a witness. Even under Justinian, however, legatees and *fideicommissarii* (and, of course, their relatives) could witness the will, although they benefited under it.

(D) How a Will Might Be or Become Invalid

A will which was invalid *ab initio* was called *iniustum* or *non iure factum*; a will which, valid when made, was invalidated by some later event, was known as *ruptum* or *irritum*.

Testamentum iniustum. A will might be void and ineffective from the moment it was made because —

(a) The testator had not *testamenti factio*; *e.g.* was a *Latinus Iunianus*.

(b) The will was improperly made; *e.g.* some of the witnesses were not lawful witnesses or the testator failed to institute or disinherit a son in his *potestas*.

Testamentum ruptum. A valid will might become void because —

(a) The testator revoked it, which he could do by making a new will valid by *ius civile*; but Theodosius provided that even an invalid second will revoked the first if the persons who would be heirs of the testator on intestacy were not instituted in the first but were in the second. A second will, though validly made, and so revoking the prior will, might, if the heir under it were only instituted heir to certain particular things, be construed as imposing a *fideicommissum* upon him to restore the rest of the *hereditas* to the heir named in the earlier will — though if the particular things were not equal in value to a fourth of the *hereditas*, the heir instituted by the second will might keep, in addition to the things given him, such further part of the estate as would make up the fourth which the *S.C. Pegasianum* secured him. After an enactment of Honorius a will was also revoked by the lapse of ten years, but under Justinian mere lapse of time had no effect unless after ten years the testator showed his intention to revoke it, *e.g.* by oral declaration before three witnesses or by a declaration registered in the *acta*. Mere intention to

revoke was not enough, but it was a good revocation if the will was destroyed, *e.g.* torn up, or the institution of the heir erased, a rule coming from the praetor's refusal of *bonorum possessio* in such circumstances.

(b) A will was also *ruptum* by the agnation of a new *suus heres*, *e.g.* by the birth of a *postumus suus*, or by a person's becoming a *suus heres* after the date of the will in some other way, *e.g.* by marriage *in manum* or by adrogation; but in the time of Justinian a will was no longer necessarily broken by the birth of a *postumus*, because, as above stated, such persons might be instituted or disinherited by anticipation, and marriage *in manum* was obsolete; but Justinian tells us that even in his time, if a testator adrogated a person or took one in *adoptio plena*, the will was revoked by the agnation of a *suus heres*.

(c) A will became technically *irritum* if after the date of the will the testator suffered *capitis deminutio*. But — (i) if the *capitis deminutio* was the result of the testator's being taken captive by the enemy, his will was not *irritum*; for it was upheld either by the *ius postliminii* or by the *fiction legis Corneliae*; and — (ii) if the *capitis deminutio* was *minima* and the testator was still a citizen and *sui iuris* at death (*e.g.* having been adrogated and afterwards emancipated), the praetor granted *bonorum possessio secundum tabulas* to the heir named in the will, which was, however, *sine re* in the time of Gaius.

(d) Another instance of a will's becoming *irritum* (or as it was here specially described, *destitutum* or *desertum*) was where, there being no substitute, the heir failed to take, *e.g.* died before the testator or lost *testamenti factio* or refused.

(e) Finally, a will might become *ruptum* by a successful *querela inofficiosi testamenti*.

II

Intestate Succession

If a man died without a will, or left a will which failed to take effect, his heirs were ascertained from the provisions made by the law for succession on intestacy. The guiding

principle of the early law was that of *agnatio*, but this was gradually modified by the reforms of the praetors, by other changes prior to Justinian, and by Justinian himself, both prior to and by his Novels. The whole system of intestate succession was remodelled by Justinian in Novels 118 and 127. The subject, therefore, falls under the following heads —

A. Intestate succession under the *ius civile*.

B. The praetorian reforms.

C. The law prior to, and as defined by, Justinian's early legislation.

D. The Novels.

E. Succession to freedmen and *fili*i (which requires separate treatment).

(A) *Ius Civile*

On a man's death intestate the first class of persons entitled to succeed to his *hereditas* were his *sui heredes*, *i.e.* those persons who were in his *potestas* at his death and by his death became *sui iuris*. There was representation, *i.e.* children of a deceased *suius heres* took his place, and when such representation happened the succession was *per stirpes*, *i.e.* the children took between them the share their ancestor would have taken. An example will make this clearer. Balbus dies, leaving a son, Maevius, whom he has given in adoption; another son, Stichus, whom he has emancipated; a daughter, Julia, who has married *in manum*; another son, Sempronius, who is married and has a son, Marcus; and two grandchildren by a deceased son, Gaius. Maevius, Stichus and Julia were not in the power of Balbus at his death, Marcus was, but did not become *sui iuris* on the death of Balbus; none of these persons, therefore, can be *sui heredes* of Balbus. Sempronius and the two grandchildren were, however, in the *potestas* of Balbus at his death and became *sui iuris*; Sempronius is, accordingly, heir to half the estate, and the two grandchildren to the other half, representing their deceased father, and taking his share *per stirpes*. Had the representation been *per capita* instead of *per stirpes*, Sempronius and each of the grandchildren would have been heirs to a third of the estate.

Failing *sui heredes*, the *hereditas* went, by the Twelve Tables, to the *agnati proximi*, *i.e.* those agnates (other than *sui heredes*) who were nearest in degree to the testator at the

time of his death or at the time of the will's failing, *e.g.* brothers born of the same father as the deceased, or an uncle on the father's side. Rather interestingly, the Tables did not call the *proximus agnatus* heir, but directed him to have the property of the deceased — '*familiam habeto*', not '*heres esto*': this lends support to the view that originally the only *heres* was the *sui* who took as next in line for management of the family property. The rules in the case of agnates differ from those with regard to *sui heredes*, because of strict interpretation of the Tables. Thus —

(a) The nearest in degree exclude all other agnates, *i.e.* there is no representation, so that if Balbus died leaving no *sui heredes*, but Titius a brother and Maevius the son of another deceased brother, Titius is sole heir, as being nearer in degree, and excludes Maevius, who is more remote.

(b) In the case above given, Maevius has not even a contingent right of succession if Titius dies before entry or refuses the *hereditas*.

(c) If there are several agnates of equal degree, the succession is *per capita* and not *per stirpes*; if, therefore, Balbus dies with no *sui heredes* and no brothers or sisters, but leaving Titius, the son of a deceased brother, and Marcus and Stichus, the sons of another deceased brother, Titius, Marcus and Stichus will each be heirs to a third of the estate.

(d) The effect of the interpretation put by the *veteres* on the *lex Voconia* was to exclude all women save *consanguineae* (*i.e.* sisters born of the same father as the testator) from succession as *agnates*; therefore, an aunt or a niece had no claim.

Failing *sui heredes* and *agnati proximi*, the *hereditas* lapsed to the *gens*; but the right of the *gens* to succeed had become obsolete in the time of Gaius and he does not discuss the topic in detail.

(B) The Praetorian Reforms

Gaius summarises the defects of the civil law of intestate succession as follows —

(i) Emancipated children had no claim.

(ii) Children made citizens along with their father did not fall under his *potestas* unless the Emperor so decreed and were not, therefore, his *sui heredes*.

(iii) Agnates who had suffered *capitis deminutio* were not admitted; because, although the *capitis deminutio* was *minima* only, the agnatic tie was dissolved.

(iv) If the *agnati proximi* failed to take, the more remote had no claim.

(v) No female agnates save *consanguineae* (sisters by the same father) could succeed.

(vi) Cognates who were not agnates had no claim at all; so that persons tracing relationship through females were altogether excluded, and, therefore, a mother had no right of succession to her children (and *vice versa*) unless she had been married *in manum*, so as to become a quasi-sister by agnation to her own children.

All these cases of injustice, Gaius says, the praetor amended by his edict, not in the sense of making the excluded persons *heredes* (which, of course, he could not do) but by giving them *bonorum possessio ab intestato*. The principal reforms were as follows —

He established a certain order according to which *bonorum possessio* was granted and gave the beneficial enjoyment of the estate to persons coming within the several classes, whether such persons were the legal heirs or those whom he alone assisted. The majority of grants of *bonorum possessio ab intestato* were *cum re*, either immediately or very soon after their introduction. The four principal grades or classes were *unde liberi*, *unde legitimi*, *unde cognati* and *unde vir et uxor*.

Bonorum possessio unde liberi. In this part of his edict the praetor promised *bonorum possessio* not only to the *sui heredes* entitled by *ius civile*, but — (i) to an emancipated *filiusfamilias*, and (ii) to a child who had been given in adoption and afterwards emancipated before the death of the original *paterfamilias*. An emancipated *filiusfamilias* had, however, to make *collatio bonorum* with the other heirs, *i.e.* before sharing the estate with them, he had to bring into hotchpot (*i.e.* into the common fund) everything he had acquired since his emancipation except property acquired in the same way as *peculium castrense* (and *quasi castrense*). The reason is best seen by an example. *A* has three sons, *B*, *C* and *D*. He emancipates *B*, and four years later dies. *C* and *D* become his *sui heredes*, and *B* is admitted to *bonorum possessio* with them by the praetor. But inasmuch as *B* may have acquired considerable

property in the interval between his emancipation and his father's death, while *C* and *D* could acquire nothing save their *peculium castrense* (and *quasi castrense*), *B* is only permitted to share on making *collatio bonorum*, as above described. If a son was emancipated, and his children born before the emancipation remained in the *potestas* of their *paterfamilias*, they became *sui heredes* of the latter to the exclusion of their own father by *ius civile*, but the praetor granted *bonorum possessio* of half the estate to the father and of the other half to his children. Of course, if there were several heirs, the father and the children each took not one half of the *hereditas*, but half of one share of it. In this case the father had to make *collatio* with the children, but not, of course, with the other *liberi* because they suffered nothing in this case. An emancipated child who afterwards gave himself in adrogation did not get *bonorum possessio* to his natural father unless the person adrogating him emancipated him in his father's lifetime. If an *emancipatus* died, his children left in the *potestas* of the grandfather were given *bonorum possessio* in this class.

Unde legitimi. This species of *bonorum possessio* seems to have been solely *iuris civilis adiuvandi gratia*, for it was open only to *sui heredes* who had failed to claim *unde liberi* within the year allowed them by the praetor, and to the *agnati proximi*, as above defined. The *suus* would normally exclude the other *agnati* even within this class in that he would probably be nearer in degree, but, *e.g.*, a brother might share with a grandson *suus* and exclude a great-grandson *suus*. The praetor, it is true, helped agnates who were cut out at *ius civile*, but only under the next class, *unde cognati*. It may also be noted in passing that the manumissor of an *emancipatus* had, by *interpretatio* on an analogy with succession to *liberti*, a civil law right of succession to the property of the *emancipatus*. The praetor implemented the right under this head, but, in the case of the *extraneus manumissor*, gave priority to certain close relatives of the *emancipatus* (*unde decem personae*).

Unde cognati. Failing a claim by persons entitled under the first two classes, the praetor gave *bonorum possessio unde cognati* to the kindred in blood of the deceased as far as the sixth degree, or the seventh in the case of children of a second cousin. This class included all descendants whether emancipated or given in adoption or not, and even though the child

was still in the *potestas* of the adoptive father; agnates who had suffered *capitis deminutio*; more remote agnates excluded by the *agnati proximi*; women who were agnates (even though not *consanguineae*); and other relatives, although the tie was only through women, so that a child could succeed to his mother, and *vice versa*. All these persons, of course, could not claim at once. The rule was that those who were nearest in blood to the deceased when the *bonorum possessio* came to this class shared equally, and there was no representation.

Unde vir et uxor. If no grant was made under the above classes, e.g. because all entitled failed to claim, the praetor granted *bonorum possessio* to the deceased's widow or widower, as the case might be.

(C) The Law Prior to and as Defined by Justinian's Early Legislation

The changes in the law made prior to Justinian display a gradual recognition of the principle of *cognatio* at the expense of *agnatio*, a development which was finally completed by Justinian himself.

The *S.C. Tertullianum*, passed under Hadrian, gave a better position to a mother who, unless married *in manum*, had hitherto had at best the right to *bonorum possessio* of the estate of her children in the third degree, i.e. *unde cognati*. If, being an *ingenua*, she had three children, or, being a *libertina*, four, the mother had the *ius liberorum* and acquired under the *S.C.* a civil law right to succeed to her children after their children (*liberi*), their father and their 'consanguineous' brothers and sisters, the mother in the absence of such brothers sharing with sisters. If, therefore, a child died leaving no issue, no father and no agnatic brother, the mother became the legal heir, though if the child left sisters the mother took half the estate. The mother's position was subsequently further improved, and by Justinian's time she no longer needed to have the number of children as formerly required. Conversely, the *S.C. Orphitianum* (A.D. 178) gave children a right of succession to their mother's estate. Hitherto, children could only claim *bonorum possessio* to their mother *unde cognati*; the effect of the *S.C.* was to raise them to the

first degree. There was a good deal of intermediate legislation, and Justinian effected some minor reforms, *e.g.* he allowed female agnates more removed than *consanguineae* to take on the same basis as male agnates. However, his major work in the field had to await the Novels.

(D) The Novels

Justinian determined to simplify the whole scheme of intestate succession and to carry to a logical conclusion the reforms initiated by the praetors by substituting the principle of blood-relationship for agnatic relationship in practically every case. His final reform, as defined in the 118th and 127th Novels, was as follows —

There are four classes of heirs on intestacy arranged in the following order —

1. In the first class come descendants, whether the deceased were a man or woman, and these descendants are determined by blood-relationship, save that a child taken in adoption counts as a natural child. Descendants in the first degree, *i.e.* sons and daughters, take equally *per capita*, and they exclude their own issue. But if a descendant in the first degree dies before the intestate there is representation: the descendant's children take *per stirpes* the share their parent would have taken had he survived. For example, *A* dies leaving a son, *B*, and a grandson by *B*, *C*. *B* excludes *C*. *A* dies leaving a son *B* and two grandchildren by a deceased son, *C*; *B* takes half the estate and the grandchildren the other half *per stirpes*, as representing their deceased father.

2. The second class is solely determined by *cognatio* and consists of ascendants, the nearer excluding the more remote, brothers and sisters of the whole blood, the children of such brothers and sisters as had died before the intestate taking their parent's share *per stirpes*. There are several very complicated rules as to the rights *inter se* of persons in this class.

3. Brothers and sisters of the half blood, whichever parent they had in common, and children of such brothers and sisters who had died before the intestate, the children taking as in 2.

4. All other collaterals *per capita*, according to nearness of degree, the praetorian restriction with regard to the sixth or seventh degree being omitted.

The surviving spouse and the *Fiscus* formed a fifth and sixth class but were not mentioned in these Novels.

(E) Succession to (a) Freedmen and (b) *Filii*

(a) Succession to freedmen. According to the Twelve Tables a slave properly freed, *i.e.* a *civis libertus*, had full power to dispose of his property by will, and might omit all mention of his patron, for the Twelve Tables only called the patron or his children to the inheritance if the *libertus* died intestate without leaving any *suus heres*. The praetor, if the *libertus* died leaving no *liberi* or if they had been disinherited, granted the patron *bonorum possessio* of half the estate where the *libertus* had left a valid will. And if the *libertus* left no *sui heredes* at all and no will, the patron's civil law claim to the whole *hereditas* remained. The intermediate changes do not need notice. Justinian finally settled the order as follows —

(i) Natural descendants of the *libertus*, including his children born in slavery but subsequently freed, but excluding *adoptivi*.

(ii) Patron.

(iii) Patron's children. (An anomalous institution arose under a *S.C.* in the time of Claudius, called *adsignatio liberti* : under it a *paterfamilias* could, by will or *inter vivos*, assign to one or more particular *sui* his potential succession rights to a living freedman.)

(iv) Collateral relations of the patron to the fifth degree.

Presumably, in the unlikely default of all these, the husband or wife of the *libertus* or *liberta* had a claim. There remained many other complicated rules, *e.g.* allowing a patron to claim a third of an inheritance of over 100 *aurei* where the freedman left it by will otherwise than to his own *liberi*.

Succession to *Latini Iuniani* and *dediticii*. Since a *Latinus Iunianus* had not the right to make a will, his property passed on his death to his patron in any event, who took not *iure hereditario*, as in the case of a *libertus*, but *iure quodammodo peculii*. Hence there were important differences between the patron's right to succeed to a *civis libertus* and to a *Latinus Iunianus*. For example —

(i) A *Latinus Iunianus* had no possible *sui heredes*.

(ii) The property of a *civis libertus* could in no case pass

to his patron's *extranei heredes*, whereas the estate of a *Latinus* could so pass. (A *S.C. Largianum*, A.D. 142, restricted the rights of *extranei* and advanced those of *liberi* so that succession to a Latin came nearer to that of a *civis libertus*, but it was still theoretically different.)

(iii) If there were two or more patrons, the property of a *civis libertus* belonged to them equally, although they may have owned him as a slave in unequal shares ; but co-patrons succeeded to the estates of *Latini Iuniani* in the same shares in which they formerly owned him as a slave.

The estates of *dediticii*, who also could not make a will, belonged in all cases to their patrons, who sometimes took as in the case of succession *cives liberti* (i.e. where, if the slave had been of good character, he would have become on manumission a *libertus*), sometimes as in the case of succession to *Latini Iuniani* (i.e. where, had the slave been of good character, he would have become a *Latinus*).

(b) Succession to a *filiusfamilias*. A *filius* might die either in his ancestor's power or be *sui iuris* through emancipation.

1. If the son died in *potestas*, his father, under the early law, took all his property as *peculium*. When the *peculium castrense* was introduced, the son could dispose of it by will after Hadrian, and under Justinian he could so dispose of his *peculium quasi castrense* also ; but if he died intestate, his father took both *peculia 'iure communi'*, but it is not clear whether this means by way of inheritance or as *peculium*. Justinian, however, postponed the right of the father in this respect to the son's children and his brothers and sisters. Of the *peculium profectitium* the son was unable to dispose, even in Justinian's time, and his father accordingly 'acquired' it on his death in any event. Originally the father took the *bona adventitia* also ; but in Justinian's time the father 'succeeded' to the *peculium profectitium* in any event, to the *peculium castrense* and *quasi castrense* only if the son died intestate, and even then after the children and brothers and sisters of the *filius* ; in the *bona adventitia* he took a usufruct, and, failing children and brothers and sisters of the deceased, the *dominium* of the property.

2. If the son was emancipated he had full testamentary capacity ; if he died intestate, his property belonged to his *sui heredes*, failing them to his actual manumitter (whether

parens or *extraneus*), unless there had been a *fiducia* in favour of the father. As already seen, the praetor enabled certain near relatives to take in priority to the *extraneus manumissor*. In the time of Justinian, however, a *fiducia* was implied in every emancipation, and the order of succession was, first, the children of the deceased; then the father, subject, however, to certain rights in favour of the mother, brothers and sisters (if any) of the deceased.

III

Bonorum Possessio

Bonorum possessio, many of the details of which have been already described, was a universal succession under the praetorian Edict; for the *bonorum possessor* had, as such, no status in the eye of the law, though he was amply protected by the praetor. As already appears, *bonorum possessio* was granted on three grounds: it might be —

(i) *Secundum tabulas*, i.e. where there was a will duly sealed as required by the Edict.

(ii) *Contra tabulas*, i.e. where the praetor wholly or in part upset the will. An example would be where some person was *praeteritus* (other than a *filius suus*, e.g. an *emancipatus*) whom the praetor required to be instituted or disinherited, in which case the *praeteritus* could obtain *bonorum possessio*, but would be bound by some of the provisions of the will, e.g. the appointments of guardians.

(iii) *Ab intestato*, when the *bonorum possessio* might either be granted to the civil law heir *adiuvandi gratia*, as affording him more effective remedies, or, *corrigendi gratia*, to some person whom the civil law excluded; e.g. an emancipated son, or a husband or wife. The chief cases of this have already been noted.

It is important to avoid a confusion of terminology. It is normal to speak of the grant *bonorum possessio* in the sense of the conferment by the praetor of certain effective remedies, but strictly the term refers only to the recognition by the praetor (in his executive capacity) of an application by someone whose claim appeared *prima facie* valid. If the claim turned out to

be groundless or someone appeared with a better claim, the grant was of no use. The grant was just a formal first stage — like the issue of a writ in England. One had to have it before one could ask for the remedies, but when one did ask for them one would then have to prove that the grant was *ex edicto*, i.e. that the claim was in accordance with the rules the praetor laid down in his edict. It was only natural for the Romans to speak of *bonorum possessio* in most cases, assuming it to be *ex edicto*; just as an English lawyer will talk of one's being 'able to sue' when he means 'able to sue successfully'. The original grant of *bonorum possessio* could normally be made quite informally by the praetor in or out of court, whatever the day. Real investigation of rights occurred upon application for the remedies.

Ascendants and descendants were allowed a year (*annus utilis*), all other persons 100 days (*centum dies utiles*), in which to make their application. Time ran from the claimant's learning of the facts on which his right was based. By failure to make it in the time limited, they lost their right. The grant, if *ex edicto*, carried with it praetorian succession, which might be absolute (*cum re*) or defeasible (*sine re*). It was *cum re* when the *bonorum possessor* was not liable to be ejected by a person with a better title (e.g. when he was the civil law heir as well), *sine re* when he was liable to be ejected. For example, Balbus, the *scriptus heres*, failing to demand *bonorum possessio*, it is granted to Titius, the intestate *heres*. The *bonorum possessio* will be *sine re* if the will was properly made and fulfils all the requirements above mentioned, since Balbus can, by his civil law action (*hereditatis petitio*), evict Titius, whose possession was merely *iuris civilis supplendi gratia*. On the other hand, possession granted to the *ius civile* heir, *iuris civilis adiuvandi gratia*, or to some person to whom the praetor could make a grant in preference to the civil law heir (*iuris civilis corrigendi gratia*), was final, and therefore *cum re*. The remedies of a *bonorum possessor* were —

(a) The *interdictum quorum bonorum*, by means of which corporeal property belonging to the estate could be obtained. It lay only against those who held the property *pro herede*, i.e. who claimed to be heirs, or *pro possessore*, i.e. who advanced no title at all. Thus it did not lie against one who claimed it, e.g. under a sale. If he succeeded on the interdict this did

not definitely settle the matter, but it gave him the benefit of possession and put to the proof any claim brought against him. A similar interdict, *quod legatorum*, lay in the special case where a person had taken possession of a *res hereditaria* claiming it as a legacy and against the wishes of the *bonorum possessor*.

(b) The *petitio hereditatis possessoria*, analogous to the *hereditatis petitio* of the civil law heir. This was probably a post-classical innovation. It lay against the same persons and with respect to the same rights in general as the *interdictum quorum bonorum*, but the judgment was not provisional but final. There were certain cases, however, in which the interdict would be preferred.

(c) An action against those holding property by some other title than inheritance or mere possession, and against debtors, proceeding on the fiction that he was *heres*. Conversely, creditors of the estate and legatees could sue him on the same fiction.

In the case of the *bonorum possessor cum re* his position was impregnable, for he could defeat even the civil law heir by the *exceptio doli*, but if the grant were *sine re*, he had no answer to the *hereditatis petitio* of the heir and would have to surrender whatever he may have recovered by the above remedies. Both kinds of *bonorum possesores* could usucapere, but where it was *sine re* the possession might be interrupted, whereas if it were *cum re* this could not occur.

The origin of *bonorum possessio* is obscure. Probably, *quorum bonorum*, which was no doubt originally its essence, was first granted by the praetor in order to confer possession on one of two claimants pending the *hereditatis petitio* — in the same way as *uti possidetis* may well have begun as a preliminary to *vindicatio*. The remedy would then be given regularly where a claimant was ostensibly entitled under the *ius civile* (*adiuvandi gratia*), e.g. *secundum tabulas*. With popular support the praetor would next allow possession to certain persons, unentitled civilly, where there was no civil law claimant (*supplendi gratia*), e.g. *unde cognati* and *unde vir et uxor*. Again with popular approval, he would make bold to thwart the civil law succession (*corrigenendi gratia*), e.g. in favour of *emancipati*. The heyday of the praetor's activity was the end of the Republic and the early Empire — roughly

the era from Cicero to Labeo. Most heads of *bonorum possessio* were developed in that period, and many became *cum re* within it.

IV

Addictio Bonorum Libertatis Causa

This *addictio bonorum* was introduced by Marcus Aurelius, and the fact that it is not mentioned by Gaius helps us to fix the date of his Institutes.

If a man, by his will, gave freedom to some of his slaves, and the *hereditas* was refused by the heir under the will, the intestate heirs and the *Fiscus*, it would be adjudged to the creditors, who would sell it to satisfy their claims, and the gifts of freedom might accordingly fail. Marcus Aurelius provided that in such case the estate should, instead of being granted to the creditors, be adjudged (*addictio bonorum*) to any of the slaves to whom liberty had been given, on the application of such slave, he giving security that the creditors would be paid in full. The *addictio bonorum* was *libertatis causa*, because thereupon all the slaves to whom freedom had been given directly became free; those slaves whom the heir was ordered to manumit being granted their freedom by the slave to whom the goods were adjudged. Marcus Aurelius further provided that, if the *addictio* could not take place because the *Fiscus* accepted the inheritance, the slaves should nevertheless receive their freedom. The Emperor Gordian permitted the *addictio bonorum* to be made even to a stranger if he gave proper security.

Justinian points out that the rescript of Marcus Aurelius, which introduced the *addictio*, was not only beneficial to the slaves but to the deceased testator, for it saved him the disgrace of a sale of his goods after his death by his creditors; and the Emperor adds that the rescript applies not only where there is a will giving liberty to slaves, but where the master dies intestate, having given liberty to slaves by a codicil, and the inheritance is refused by those entitled *ab intestato*; and, further, that, in his judgment, the rescript must be taken to include even cases where the gifts of freedom were made by the master *inter vivos* or by a *donatio mortis causa*, so as to

prevent any question as to whether creditors have been defrauded. The grant could not be made until it was certain that no one would accept the inheritance, and a person under twenty-five was not bound either by his acceptance or rejection until that age. If, therefore, *A*, the intestate heir, were aged twenty, no valid *addictio* could logically be made for five years; but Justinian states that, even in that case, it might be granted, and that if *A* had declined the *hereditas* before twenty-five, the grant had been made and the slaves freed, then, even if he changed his mind at twenty-five and applied for *restitutio in integrum*, thus rescinding the *addictio*, the gifts of liberty were still upheld.

The above four forms of universal succession were subsisting in the time of Justinian: those about to be mentioned were either obsolete or no longer had the same effect.

V

Cessio in Iure Hereditatis

This species of universal succession consisted of the transfer of the *hereditas* by the *heres* to a stranger by means of *cessio in iure*, so as to make the stranger *heres* in place of the real heir.

The only kind of heir who could so transfer the *hereditas* was an agnatic heir (*legitimus heres*) on an intestacy, and then only before he made *aditio*. This was not strictly a breach of the rule, *semel heres, semper heres*, because the *legitimus heres*, unlike the *suus*, was not heir at all until entry; what he transferred therefore was not his heirship but his right of entry. If such a person made *cessio in iure* after entry, even though he validly transferred the corporeal property of the *hereditas*, he still remained *heres*, and liable to the creditors of the estate, while debts due to the estate were extinguished, and the deceased's debtors were the gainers.

If the *scriptus heres* (*extraneus*) in a will made *cessio in iure* before *aditio* nothing resulted, for his right to the *hereditas* was dependent on entry and was probably not, like that of the *legitimus*, regarded as an inchoate right conferred by the Twelve Tables. But the reason of the distinction is obscure. If the *extraneus scriptus* made the transfer after entry, the

result was the same as where the *legitimus heres* transferred after *aditio*.

With regard to a transfer by the *suus heres*, who was, of course, heir without *aditio*, there was a dispute between the two schools. The Sabinians held the transfer to be absolutely without effect; the Proculians thought that the effect was the same as where a *legitimus* or *extraneus* made a transfer after entry.

This kind of succession was obsolete in the time of Justinian.

VI

Other Cases :

(a) Bankruptcy ; (b) Adrogation, *Manus* and *Coemptio* ; (c) The *S.C. Claudianum*

(a) *Bankruptcy*. This subject will be discussed at length in the law relating to actions under the topic of execution (*post*, p. 469).

(b) *Adrogation, manus and coemptio*, as modes of universal succession, have been dealt with already. In the time of Justinian marriage *in manum* and *coemptio fiducia causa* were altogether obsolete and adrogation no longer operated as universal succession, since it merely gave the adrogator the usufruct of the property of the person adrogated.

(c) *The S.C. Claudianum*. This *miserabilis per universitatem adquisitio*, which took place when a free woman gave way to her passion for a slave and forfeited her freedom and her estate at the same time to the slave's master, was abolished by Justinian. Details of how it worked are unknown.

PART FIVE

THE LAW OF OBLIGATIONS

PART FIVE

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I

Introduction

(A) Nature of an Obligation

GAIUS gives no definition, but Justinian defines *obligatio* as a legal tie whereby one is subjected to having to make some performance in accordance with the law. This definition more or less reflects the Roman way of thinking of obligations, at least in the developed law. The use of '*vinculum*' (tie) shows the essentially bilateral character of the notion, whilst the body of the definition concentrates on the duty aspect of the one side. This duty aspect, which may loosely be identified as '*debitum*', will normally be backed up by liability to legal process, and the duty will necessarily imply a right or claim in the other side. So it is that *obligatio* — and *debitum* — is used to indicate not just the duty, but the right; and it is in this sense that both Gaius and Justinian use it when they treat of it as part of the law as to *res*. It is an asset of the creditor, part of his *patrimonium*.

The absence of a definition in Gaius and probably in all the classical jurists, except possibly the latest ones, seems strange at first sight, but it means, not that they were not clear what it meant, but that the term was used in quite an ordinary sense that would be intelligible to laymen. They were not ones for generalities (though they did like classifying): they preferred to treat of factual situations and the remedies to meet them. The noun '*obligatio*' was only a recent one (the verb '*obligare*' was much older), dating from the end of the Republic, and it was probably mainly used in legal contexts, but its derivation from the literal sense of tying and binding was clear to see.

Justinian, with his love of making definitions etymological, stresses this original idea with the words '*vinculum*' (tie), '*adstringimur*' (bound) and '*solvendae*' (loosing). In fact, most of the words of obligation had their origins in very real, physical fetters — just like our own word 'bond'. And there is no doubt that originally the fetters were very much in evidence in what obligations there were.

The early history of obligations is, however, most obscure. The original institutions seem to pre-date even a primitive legal system. It seems apparent, however, that if one wanted to be sure of another's keeping his promise or performing his duty, one insisted on a lever wherewith to induce him; perhaps a pledge, but more normally a hostage. The early legal system shows this clearly: to ensure that litigation proceeds smoothly and execution follows effectively hostages are given. Originally, perhaps, the hostage was kept securely in custody, but very soon the creditor (or litigant) would be content with being able to proceed against him if the debtor defaulted. The hostage would then begin to be transformed into a surety, and the *vas*, the *praes* and the *vindex* are all examples of such early sureties, at least in the sphere of legal procedure. The next stage of development would be when the creditor in certain cases came to be content with a legally recognised method of proceeding against the debtor directly, not against a hostage or surety. By the time of the Twelve Tables there existed an institution called *nexum* (or *nexus*), which we might regard as a sort of primitive contractual obligation: it involved, as far as we can see, a ceremony *per aes et libram* whereby the debtor incurred a very real liability to have execution against his person by *manus iniectio* if he did not satisfy his obligation. This obligation would be payment of a debt, and the liability to the savage form of execution was the cause of much bitterness between patricians and plebeians until the *lex Poetelia* (c. 300 B.C.), which greatly mitigated the condition of *nexi*, freeing them from their state of subjection. Thereafter *nexum* gradually died out and was not really extant when the Romans came to talk of *obligatio* and began to classify. *Nexum*, which involved a sort of bondage, was almost certainly linked, if only by having the same remedy (*manus iniectio*), to the condition of the *iudicatus* (judgment debtor under the *legis actio* system) and the *damnatus* (someone under a liability arising from the

use of '*damnas esto*' in a *lex* or in a formal act — e.g. legacy); and it may have some relation to *mancipium* and *noxae deditio*; but little more than that can be said of an institution on which there is scarcely any evidence.

Another institution, which we would not hesitate to class as an obligation in the Roman sense as well as our own, was the *fiducia*. This was the forerunner of several contracts *re* and has been dealt with under the head of real security (*ante*, p. 220). It was, however, never classed as a contract, even though it attracted a *bonae fidei iudicium*, the *actio fiduciae*, which Gaius puts in the midst of his list of such *iudicia*, all the others being contractual or quasi-contractual. It was called a *pactum*, but never a *contractus* (as far as we know), and substantively it was dealt with by Gaius in connexion with *mancipatio*, to which it was always attached. Although it lasted till after the classical period, it does not seem to have found a place in the law of obligations. Perhaps the explanation is that it antedated any real notion of obligation and so came to be dealt with where it most naturally arose at the time — alongside the formal conveyance — and the Romans never saw fit to remove it.

However, certain institutions that were definitely obligations and contracts in later times go back as far as *fiducia*, and perhaps even *nexum*: these were *mutuum* and *stipulatio* (at least in the form of the *sponsio*). It is just another example of situations arising frequently and remedies being provided to meet them, and then later the lawyers seeking to put them in order. *Mutuum* and *stipulatio* were not necessarily tied to any formal conveyance, so they would be treated quite separately until there were enough specific heads of liability for lawyers to talk of classes of obligations and contracts. It is, however, interesting to note that the Romans, very early, clearly distinguished contract and conveyance. Even *mancipatio*, originally a simultaneous sale and transfer, was never regarded as a contract (though, perhaps, as a *negotium* or transaction): despite liability for *auctoritas* its essence was not an obligation but a transfer, and as such it was always treated.

So far the broad picture (unlike the details) of the development of obligations is reasonably clear. The creditor (to use the term loosely to describe anyone to whom an obligation is

owed) can be reasonably sure of obtaining the advantage that is due to him because at first he has legally recognised, but extrajudicial, remedies against the debtor or his surety and later has a full legal action to induce the debtor into performance or, failing that, to obtain compensation in damages from him. It is thus very much a *res*, an asset of the creditor, while for the debtor it is a true *iuris vinculum* — he is legally 'bound' to make performance.

Up till now the examples have been contractual ones, and it seems clear that the Romans first thought of obligations in the light of liability for contracts. However, delict had had just as long a history as any contract. Originally delict had been an act for which legally recognised retaliation had been the sanction. From attempting to regulate the retribution exacted by the indignant victim, the law progressed through the stage of encouraging peaceful settlements, in the form of agreements between victim and wrongdoer for buying off the retaliation, to the state where the wrongdoer was bound to make payment to the victim by reason of actions granted by the law. The principle of noxal liability shows this most clearly: the slave or *filius* that did a wrong was liable to be seized by way of retribution, but his *dominus* or *pater* could buy off the victim; while later the payment would be made and even came to be expected, the possibility of handing over the wrongdoer to escape the payment remaining as an option for the *dominus* or *pater*. Now the fact that a wrong gave rise to a liability to pay money by way of penalty and compensation was sufficient for the Romans to regard the wrong as a source of obligation. It is almost certain that this line of thought occurred after the notion of obligation as arising *ex contractu*, and the idea of delict as a source of obligation was always subsidiary to the contract idea.

Terminology gives us a clue to a fundamental difference in outlook between the Roman and our own views of obligations. To the Romans obligations were liabilities that arose from particular factual situations: an event brought an obligation into existence. Thus an *obligatio* arose *ex contractu* or *ex delicto*, according to Gaius in the Institutes, and also *ex variis causarum figuris*, according to him as reported in the Digest. According to Justinian it arose from the two primary sources and also *quasi ex contractu* and *quasi ex delicto*. A

certain handing over of a *res* (contract *re*), a particular form of words (contract *verbis*), a mere agreement (contract *consensu*), an unsolicited act of help in an emergency or a mistaken payment of money not due (both quasi-contractual) and a stealing of a chattel or a blow to a person (both delicts) were all events which brought into existence an *obligatio*.

Now this is alien to modern English thought, although it may not have been so for the classical Common Law. We think in terms of rights and duties, rather than in the more concrete Roman term of liability. To us contract cannot be put on the same level as tort: tort is strictly equivalent to breach of contract; they are both infringements of duties; the duty in one case arises from the general law and in the other from a legally recognised agreement. So it is that we think of the obligations in the law of tort as arising prior to the wrong (the tort) out of the general duties, the duties *in rem*, owed to all the world. The obligation to us then is not the liability to pay penalty or compensation or make some other performance, but the duty to avoid the infliction of harm upon which we would be liable to an action in damages. In the same way in contract we separate the obligation to perform the contract from the liability to legal action for breach of the obligation. This is all very logical, much more so than Roman law, but there is a snag: the clear division between duty and liability for breach of it is absent in the field of quasi-contract. There is no 'breach' in quasi-contract, nor is there an antecedent duty. The duty and the liability are *in personam* and arise at the same moment, *e.g.* on payment of money under a mistake of fact. Moreover, in tort the cases of strict liability (*e.g.* for escape of dangerous things under the Rule in *Rylands v. Fletcher*) do not fit into terminology of antecedent obligation without considerable artificiality.

Now in Roman law, the notion of duty is of little importance in the concept of *obligatio*. They never talk of breach of contract or at least never go so far as to put it alongside delict. It is the action that dominates the terminology and thought. One sues out *actio empti* on sale as one does *actio furti* on theft. As soon as an agreement is reached and becomes effective the action is thought of as being available to ensure that the obligation is fulfilled. The Roman attitude is more nearly approached in English law by Equity than by Common

Law; thus in a contract of sale of land or of rare chattels the remedy of specific performance is notionally available from the moment of contract whereas the action for damages arises only on breach.

It is therefore natural for the Romans to regard delicts as creating obligations, but there is evidence to show that they came to be so regarded only when the idea of *obligatio* had become firmly established in respect of contract. This development of delict probably occurred only shortly before the classical period, and it is interesting to note that both Gaius and Justinian treat of discharge of obligations after contract and quasi-contract, but before delict. This is logically indefensible, but it may be explained historically and also by the fact that the obligation in delict is simple and does not give rise to the variety of issues that come up in discharge of contract.

Gaius shows clearly that in classical law the term '*obligatio*' was used only of liability enforceable at civil law by means of an action with a *formula in ius concepta*, not of liability under praetorian actions framed in *factum*. However, in the field of delict in particular, Gaius did treat of praetorian liabilities (e.g. under *rapina* and *iniuria*, two of the four *civil* delicts) alongside civil ones, but this is probably explicable by the liability's being in each case a praetorian extension of an inadequate civil remedy. The fact that Gaius omits the real contracts of *commodatum* and *depositum* in his treatment of obligations is probably best explained by their not long having emerged from a purely praetorian protection by *actio in factum* into contracts supported by *actiones in ius*. If the contention that *obligatio* was liability upon an *actio in ius* is true, then it may be that the word '*oportere*', which occurs in the *formula* of such actions, is the key to the idea of obligation. It would supply the element of 'ought' and thus make *obligatio* into a duty as well as a liability.

(B) Classification of Obligations

Justinian's first division is into civil and praetorian obligations, a division alien to Gaius and other classical jurists because *obligatio*, as seen, was civil only. Gaius may mention praetorian liability in his law of actions, but for him it is not *obligatio*. The idea, however, was moving slowly towards

inclusion : terminology was '*teneri actione*' ('being liable under an action') or '*actio danda esse*' ('an action ought to be given') for praetorian liability as opposed to the '*oportere*' and '*obligari*' of civil law, but the substance was very similar. In each the *actio* made the liability. It might almost be said that substantively the two liabilities were closer to each other than other intuitions of the different systems — e.g. *hereditas* and *bonorum possessio*, yet here, rather surprisingly, the strict wording was retained even by the lax Gaius. By Justinian's time, of course, the *formula* was long dead and the difference was no longer such as to exclude the term *obligatio* for praetorian institutions. This also meant, of course, that his primary distinction was purely a historical one, based on the source of liability.

The main classification is into the *causae* of *obligationes*. For Justinian, as stated, these were four in the first place : for Gaius two. One is struck by the way in which Justinian carries out his classification. The Romans liked to classify : the Byzantines loved to classify symmetrically, their passion running to such lengths that their classifications dominate and even falsify the substantive law. Nowhere is this clearer than in the present context. Gaius classifies, but rather imperfectly ; whilst Justinian is obsessed by the number four. There are four *genera* of *causae* : there are four delicts : there are four heads of contract : four contracts *re*, four *consensu*. The innominate contracts, pacts, praetorian delicts, are omitted from the Institutes, perhaps in imitation of Gaius, perhaps because they would break the fourfold classification.

As Gaius admits, the division into *ex contractu* and *ex delicto* is not comprehensive. It is probable that the attribution to him by the Digest of the further source of obligation, *ex variis causarum figuris* is correct, or at least that the classification into three heads was current in the later classical period. This would certainly cover the obligations described by Justinian as *quasi ex contractu*, the similarity of which to contracts is not always very marked. The obligations *quasi ex delicto* are not even mentioned by Gaius, and, as will be seen, their treatment separately from delict has caused much criticism.

Other distinctions exist as regards obligations, but again they are really restricted to the sphere of contract. Thus

natural obligations, distinguished from civil (which for this purpose includes praetorian as well as strictly civil ones), arise from various transactions which are all agreements that for some reason cannot operate as contracts. The list is uncertain and the legal effects vary, the only constant one being that money paid or performance made cannot be rescinded later by use of the *condictio indebiti* and such remedies. Whether they were greatly affected by ideas of *ius naturale* or not, they do not seem to have had any legal significance until the period of the Empire. The first case seems to have been that of the slave who promised in such a way that, had he been free, he would have been legally liable; so, if the master, or the ex-slave after manumission, kept the promise, there was no revocation on the ground that the debt was void. Promises between *patres* and *fili* within the *familia* also gave rise to a natural obligation. Other examples (e.g. where a civil obligation had been extinguished by action brought but the action had failed on a technicality, or where a loan to a *filiusfamilias* was void by the *S.C. Macedonianum*, *post*, p. 325) probably became defined as natural obligations post-classically. In some of the cases legal consequences other than the barring of the *condictio indebiti* existed: pledge or surety for the debt could be valid, and occasionally set-off might have been allowed in a civil action.

The classification of unilateral and bilateral is applicable to all obligations, but since those *ex delicto* and *quasi ex delicto* are obviously unilateral it is only important in contract and quasi-contract. The same is true of the so-called *stricti iuris* and *bonae fidei* obligations which depend on the type of action available, and to these actions the delictual remedies, being penal, were probably utterly alien.

II

Contract

To the Roman jurist, whose use of the word was much the most frequent, *contractus* was any agreement which the law would enforce by action. Terminology was not exact and there is some sign of the term being used to include quasi-

contracts occasionally, while, on the other hand, it was probably mostly used for those agreements that were effective at civil law, other agreements being variously called *pacta* and *constituta*.

At first sight the Roman law looks strange and even a little crude alongside the English law of contract. The Romans had no unified law of contract, just a system of several distinct contracts. The cause of the great distinction between Roman and English law is the English doctrine of consideration which enables any agreement supported by consideration to be regarded as *prima facie* a legal contract. Of course, there are many other factors: the genuineness of the agreement, the intent to create legal relations, capacity, absence of fraud and duress, the lawfulness of object, the occasional need for writing; yet these are all primarily negative criteria, not positive in the same way as consideration. When normal adults make an agreement there has always to be consideration for there to be a contract — all the other requisites are essentially absences, *e.g.* of mistake, of fraud, of illegality; even the intent to create legal relations is no exception, for it is inferred in most cases where there is consideration, and the legal rule would be better expressed as that there must be no intent *not* to create such relations.

Roman law, however, has no such general positive criterion beyond the fact of agreement and so it has no unified law of contract. It can, therefore, merely recognise various situations in which there is agreement as giving rise to obligation. It is a law, then, of particular transactions just as the English law of tort is really a law of particular wrongs rather than one of general liability for wrongdoing.

Now the English unified system of simple contract is really a historical accident, or rather the result of a series of accidents. It started with the imposition by the Common Law of the necessity for a seal before the action of covenant would lie on an agreement. The requirement of a deed meant that the vast majority of the people could not readily use the only form of enforceable agreement. Later there developed the simple contract out of what are really tortious origins. These origins (the writ of *assumpsit*) and the influence of the old and imperfect action of debt gave rise to the doctrine of consideration which became fully developed in the nineteenth century.

The result is that the English formal contract, the covenant, has been developed quite separately from the simple contract and is more normally studied in the field of property law.

In contrast with this, Roman law had a formal contract, the *stipulatio*, which was open to use quite easily by any Roman and which was later developed to meet nearly all the needs of the community. It is probably true to say that it was the comparative simplicity and adaptability of the Roman formal contract that prevented the emergence of a law of simple contract as the English know it. The English achievement is paradoxically due to the Common Law's failure to find a convenient formal contract.

Now the Romans classified their contracts by the source (*causa*) of the particular obligations, *i.e.* by the event that brought the liability into existence. Thus the contracts *re* became enforceable obligations not necessarily at the moment of agreement (*consensus*) but at that of handing over a corporeal *res*; likewise those *verbis* at that of pronouncement of the requisite form of words, and those *litteris* when the entry was written in a ledger. All these required *consensus* between the parties before they could be contracts, but there was no liability till the necessary event occurred: an agreement to lend or to take on deposit was not enforceable, nor was a full agreement which had not yet been expressed in a stipulation. The contracts *consensu* were special cases. Here, for commercial and practical reasons, the Romans became prepared to enforce the agreement as soon as it had been made: it was the *consensus* itself that made the contract.

In some ways the Romans were more logical and comprehensive than we. To them a voluntary bailment was a contract: there was an agreement and it gave rise to an obligation. To us, however, the gratuitous bailment has been an institution without a real home in any branch of law. The lending of money without interest — the Roman *mutuum* — may or may not be a contract in the present English law, depending upon one's view of the alleged consideration. Moreover, the English law of contract has ragged edges: the law of warranties still displays its tortious origins, breach of promise has its own peculiar, almost tortious, character, and fraud drags the student right into tort. Yet despite such features the English law has made one of its greatest achievements in contract and there

is no doubt that our system is much more suited to a modern community than the Roman would be. However, that is not to say that the Romans' own achievement was not great, did not have its advantages, and could not admirably fulfil the needs of a very active, complex and civilised society.

In a law of greatly differing contracts it is difficult to lay down general principles for the whole field. Most rules will have to be stated strictly under the head of the particular contracts and there are a great many differences where the contract is unilateral and is enforceable by *stricti iuris iudicia* as opposed to one bilateral and enforceable by *bonae fidei iudicia*. However, some general observations can be made on capacity, on *consensus* and on other considerations.

(a) Capacity : most cases have been dealt with in the law of persons, but a brief recapitulation is convenient. Firstly, those who have no *intellectus*, i.e. the *infans* and the *furiosus*, can make no contract at all whether or not they would merely be benefiting, as under a *stipulatio* in their favour, and whether or not their *tutor* or *curator* approve. An *impubes* could without *auctoritas* make a contract that was solely of benefit to him, e.g. a *stipulatio*. Whilst *perpetua tutela* lasted, women were in the same position. Both could make any contract with *auctoritas*, and an interdicted prodigal may have been similarly treated — certainly where he had not the *consensus* of his curator. In general peregrines and others without *commercium* were not severely penalised in the sphere of contract : all stipulations except the solemn *sponsio* were open to them, and otherwise only the contract *litteris* was unavailable to them, at least as far as being creditors under such a transaction. Contracts by minors without a curator's consent were virtually voidable (*ante*, p. 144). In later law minors nearing 25 could be exempted from this incapacity by imperial decree (*venia aetatis*).

As regards persons in power, *filiaefamiliarum* (including wives *in manu*) and those *in mancipio* were not capable of being bound by any contract until after the classical period ; they could, of course, contract a unilateral agreement in their favour, but the benefit went to the *paterfamilias*. *Filiifamiliarum*, apparently, were originally in the same position, but by the time of the Empire they were liable on their contracts at civil law. However, they would normally have no property, and, since execution could not be levied against their persons,

a creditor would have to wait until they became *sui iuris*. If they were emancipated the *capitis deminutio* destroyed the civil liability, but the praetor would investigate and, if satisfied (*causa cognita*), would grant an *actio utilis*, but only to the extent of the son's assets (*beneficium competentiae*). If he became *sui iuris* on the death of the *pater*, the civil liability remained, but here again the praetor intervened to investigate (e.g. whether the son had been disinherited) and the creditor, on any action thereafter allowed him, could recover only to the limit of the son's means. If the son had a *peculium castrense* or *quasi castrense*, it was treated entirely separately. If he contracted on the strength of it he could be sued in its respect immediately as if he were a *paterfamilias*; if he agreed on the basis of his father's property, then either of these *peculia* was safe from action. As will be seen when agency is discussed, the praetor did intervene also in certain cases to render the *paterfamilias* liable on contracts made on his behalf by a son as well as by a slave. By Justinian's time a *filia* over age was apparently in the same case as the *filius*, her disability disappearing along with the *tutela perpetua* of the woman *sui iuris*. *Manus* and *mancipium* had, of course, long been obsolete in all but formalities by Justinian's time. It remains to be added that *children* in power could not, until puberty, ever incur contractual liability, there being no possibility even of *auctoritas*, and that slaves were at civil law, like *filiae* and bondsmen, capable of benefiting but unable to incur liability under an agreement.

(b) *Consensus*: this will normally be a simple matter of fact, did the parties agree to the transaction in question? Occasionally, however, difficulty arose in respect of the merely apparent *consensus*. What if the parties were not *ad idem*? would their mistakes, or that of either of them, annul the affair? Now the Roman answers were not completely clear and the type of contract might make a considerable difference. However, basically the Roman attitude differed from the English. Whereas the Common Law will normally ignore the uninduced unilateral mistake in fairness (and even more than fairness, on occasions!) to the other party, the Romans were reluctant to recognise a contract where it could be shown that the various minds were not in harmony. There were various categories of what may be called fundamental mistake vitiating

consensus. Perhaps the most radical was *error in negotio*, where each of the two parties misunderstood the type of transaction the other intended to effect. So, if *A* hands a *res* to *B* by way of loan but *B* thinks it a gift, there is no contract of any sort, but *A* should, of course, have a quasi-contractual remedy by way of *condictio*. Another mistake that could be fatal was one *in persona*: this occurs where *A* makes a promise to *B* whom he thinks is *C*. Presumably, where the personality of the promisee is immaterial, *e.g.* in many sales in a market, the error made no difference; however, in cases involving either credit, such as *mutuum*, or trust, such as deposit or *societas*, personality may be all important. Apparently *error in persona* even vitiated a *stipulatio*, at least in developed law when the *obligatio* depended on the *consensus* as well as on the formality. If any benefit passed under the abortive transaction, once again a *condictio* of some sort would presumably lie. There are no texts on the question of error as to the qualities of the *persona*, but it is likely that in *stipulatio*, and even in *bonae fidei* transactions, the error, even though a vital one, could not of itself upset *consensus* — *e.g.* where *X* promises to lend *Y* money knowing him as *Y*, but erroneously thinking him the nephew of a rich man.

Error in respect of the subject matter (*in corpore*) seems to be fatal in all contracts, *e.g.* where *X* promises or sells Stichus, a slave, to *Y*, and *X* and *Y* have different slaves in mind. Once again, it does not seem to matter that only one side was mistaken; *e.g.* if the slave *X* had in mind was called Stichus while *Y* thought another slave, Pamphilus, was Stichus. There is no question of holding one side to a bargain as expressed where the other side is un mistaken and not fraudulent. That such a solution occurs in English law is due to concentration on the external appearance of a bargain, itself probably a consequence of the universal necessity for consideration. In Roman law the error had to be in respect of the central subject matter of the contract before validity was upset. Thus, if *X* agrees to buy *Y*'s shop with the stock in it and with the slave manager, *X* is bound although he was mistaken as to the extent of the stock and thought the manager was a different slave altogether; and this was the law even if the stock or the slave was worth more than the premises.

Mistake as to the amount of the price could not occur in

stipulation. In sale and other such contracts the rule was that if the party in error would get less than he thought he would the contract was void ; otherwise the mistake would be ignored and the contract valid, the mistaken one thus getting a windfall while the other party was in no way worse off than he thought.

The last type of error causes the most difficulty to scholars. It is error *in substantia* and may be described as a mistake as to the essential quality of the *res* in question as distinct from its identity. In *stipulatio* the position is clear : even the gradual making of the formal contract to rest on *consensus* never came to allow the promisor to plead that he did not know the quality or value of what he promised and thus that he should be released. In *bonae fidei* transactions, however, some relaxations were made in favour of the mistaken party, but only it seems where he was the purchaser or someone else receiving the *res*. The texts are baffling. Thus, if what is sold is thought to be wine but is in fact vinegar, there is no sale ; similarly a bronze object thought to be gold and one of silver-plated base metal thought to be solid silver. But if it is wine gone sour, or gold alloy instead of solid gold, the sale is good. Again, if a girl slave is thought to be a boy, there is no sale, but if the girl were thought a virgin and were not, the sale would be good. Perhaps the only cases are ones in respect of completely different metals and of sex in slaves (or animals ?). If *A* buys a table thinking it of oak when it is of a lesser wood, the contract seems to have been valid. Possibly the texts were all, at least as written by the original jurists, cases of misdescription by a seller, not cases of uninduced mistake. In such an event the rule would be more reasonable and would be a test to decide whether the contract should be avoided or just damages awarded. (Not unlike the English breach of condition and breach of warranty.)

Another possible explanation is that, even if there is no misdescription, the words *ex fide bona* are construed so as to regard as unconscionable the forcing of a person to take something of a completely different nature from what he thought, but that the law hesitated to apply such a doctrine further than the most basic instances. Much depends on the unsolved question of how wide a discretion the *iudex* was given by the phrase *ex fide bona* in the *formula* : could he take less than

fundamental mistakes into account, as well as fraud, when assessing damages for the *condemnatio*?

Rather interestingly, the effect of all these types of mistake seems to be to make the contract void, not voidable, as the English lawyer would put it. The difference may not be so important in Roman law because the unmistaken party will rarely wish to refuse to 'repair' the contract by fresh *consensus* if the mistaken one is willing to go on with the agreement. It is also important to note that an error in a stipulation or other *stricti iuris* contract went to the root of the obligation and so did not have to be specially pleaded by *exceptio*. If the error vitiated agreement, then one had not promised what was claimed, one did not owe it. Here it was distinct from fraud and duress, which enabled one to plead, not that there had been no consent, but that consent had been wrongly induced and the promise should not be enforced.

Once again, where a mistake has invalidated a contract for any reason, there may always be some *obligatio* in existence and so some quasi-contractual remedy. If X lends money to Y, thinking him, in the dark, to be Z, there is no *mutuum* because there is no consensus. However, X still, of course, has a *condictio certae pecuniae*, the same remedy as for *mutuum*, to recover the money from Y.

Closely associated with error is the question of fraud (*dolus*). The fraud may have been such that it caused the victim to act under a fundamental mistake, and then, of course, the contract is void. If the victim was merely induced by fraud to consent to the contract and there was thus no vitiating error, it appears he had no remedy in the case of a stipulation until Aquilius Gallus, in the time of Cicero, introduced the *actio doli* (*de dolo*) and probably the *exceptio doli* as well. The *actio* lay for compensation for any loss sustained, while by the *exceptio* the victim could bar any action by the defrauder. In *bonae fidei* actions there was no need to plead the *exceptio* because the judge had jurisdiction to investigate all matters going to good faith. This resulted in a great difference from the operation in *stricti iuris* actions: the judge did not have to quash the whole action as under the *exceptio*, he could take the fraud into account in assessing any damages. If the contract had been executed, the *actio doli* lay as under a *stipulatio*. *Restitutio in integrum* was always a possibility, but the praetor

normally preferred to leave the victim to sue out the penal action and get damages in compensation. The action carried *infamia*.

Duress (*metus*) was somewhat similarly dealt with. This was a narrow concept, which extended only to fear of death or serious bodily harm to oneself or one's family and to one or two other cases, such as fear of a capital charge being brought or of an assault on one's chastity. It was distinguished from true force (*vis*, sometimes called *vis absoluta* with *vis compulsiva* being equivalent to *metus*), which would prevent consent of any sort; e.g. where X held Y down and took his watch, saying that he was borrowing it — this would be *furtum* and *rapina*. Originally a formal act, such as *stipulatio*, was valid despite the duress. However, in the later Republic an *exceptio metus* was allowed, similar to the *exceptio doli*. An *actio metus* also arose, creating a praetorian delict like the *actio doli*, and it operated to compensate for any loss, enabling fourfold damages to be obtained if restitution were not made. It was even available, to a certain extent, against innocent holders in due course from the extortioner. *Restitutio in integrum* was again another possibility, perhaps more used than with *dolus*. In *bonae fidei* transactions it is uncertain whether *metus* invalidated the whole contract or was treated like *dolus* and just taken into account by the *iudex*.

Other general rules could be stated, e.g. (i) an illegal or immoral object made a contract invalid; (ii) a contract, performance of which was impossible either physically or legally (e.g. sale of a *res religiosa*), was also void; (iii) contracts were intensely personal obligations and rights and duties could not be imposed by them upon independent third parties; (iv) it was possible to make conditional contracts, at least in developed law, and in the absence of agreement there was usually no way of rescission by one party even before the condition was to happen. However, most of these rules need no further explanation or will be dealt with more conveniently under the particular contracts, especially under *stipulatio*.

Gaius specifies four heads of contract. They may be treated as covering the basic contracts recognised in classical times. Other contractual situations arose even then, but only under praetorian law (e.g. *pacta, constituta*), and, as has been

seen, such would not be regarded as *obligationes* by the classical jurists. The innominate contracts, which will be dealt with after the four classical groups, probably did not give rise to contractual remedies till the late classical period or even after.

(A) Contracts made Re

As already said, Gaius mentions only one 'real' contract, *mutuum*. Justinian includes *commodatum*, *pignus* and *depositum* as well. In fact, these three have nothing in common with *mutuum* except the physical handing over of a *res corporalis*. Otherwise, *mutuum* is purely unilateral (*i.e.* the only obligations lie on one party), whereas the others are bilateral (*i.e.* obligations lie on both parties), even though *commodatum* and *depositum* are normally only imperfectly bilateral (*i.e.* obligations are primarily on one party, but the other may be subjected to some in certain events). The remedies for *mutuum* are *iudicia stricta* (the *condictiones*), whilst the other three are protected by *bonae fidei iudicia*. *Mutuum* was an ancient civil law obligation; the others were developed by the praetor, probably out of the old *fiducia*, and appeared in the later Republic. *Mutuum* involved the transfer of ownership while *pignus* passed only *possessio* and the other two normally just *detentio*.

Fiducia, which we would classify as a real contract, was dead by Justinian's time along with *mancipatio* and *cessio in iure*, to which it had always to be attached. This parasitic quality probably led to its being called merely a *pactum*, never a contract. It has already been dealt with under the law of property, where Gaius and other classical jurists treated of it.

1. *Mutuum*

Mutuum was a loan of *res fungibiles* (*e.g.* money, wine or grain) for consumption. Necessarily, therefore, the borrower became owner, and his obligation was to restore not the thing lent but its equivalent in like kind.

Its origin is uncertain, as also is its early relation to the formal and secured *nexum*. It is feasible to suppose that while *nexum* lasted *mutuum* had little importance, being an arrangement almost invariably between friends and so rarely giving rise to litigation; when litigation did arise it would have been by *legis actio* procedure and the obligation would hardly have

been regarded as contractual at all. It is probably for this reason that even as late as the time of Gaius there remained the notion of equating the loan vitiated by fundamental error and giving rise to a quasi-contractual *condictio* with the true loan, *mutuum*, with its *condictio* now recognised as contractual. After *nexum* had had its claws drawn by the *lex Poetelia* in the middle of the Republic, the informal *mutuum* must have become the normal loan of money and it may even be that the special form of *legis actio*, the *condictio*, was originally devised to give it a simple remedy.

The contract was purely gratuitous: the borrower was, under the *mutuum*, bound to return only the exact equivalent of what he received, without interest, even though he was in default (*mora*) by failing to repay at the proper time. The only means of securing interest was to make the borrower promise it by a separate *stipulatio*. An informal agreement as to interest was a *nudum pactum* (an unenforceable agreement), but it did give rise to a *naturalis obligatio* so that interest paid was not later recoverable by the debtor. If a loan was in performance of a promise by stipulation, then the obligation to repay was on the *stipulatio*, not on *mutuum*; it was a general rule that a formal contract always overrode any informal agreement (*e.g.* loan or sale) in the creation of the liability. It is uncertain whether it was more common in commercial transactions to supplement an ordinary *mutuum* with a *stipulatio* as to interest or to make the whole contract by *stipulatio*. In the developed law there were restrictions on the amount of interest chargeable — *e.g.* 12 per cent *per annum* in classical times, and 6 per cent on commercial loans under Justinian. Compound interest was not allowed.

One particular institution had its own rules. This was *fenus nauticum*. It was a loan to finance the voyage of a cargo vessel and it was not repayable if the ship was lost. There was no limit to the interest chargeable until Justinian set one of 12 per cent, and the duty to pay such interest could be created by simple agreement, for enforcement did not require a stipulation. It was obviously developed as an inducement to the investing of capital in maritime trade.

Some special terms were possible in the developed *mutuum* without the need for stipulations. Thus, a date could be fixed for repayment and no action would be available till then

(whereas in the loan vitiated by mistake the quasi-contractual remedy was available immediately). The loan could be subject to conditions, repayment being required only in certain events, *e.g.* in *fenus nauticum*.

The remedy of the lender was a *stricti iuris* action, a *condictio*; *certae pecuniae* in the case of money lent, *certae rei* (or *triticaria* — after the most normal instance, grain) in that of other things. There was no action for the borrower because the lender had no duties. If the money or *res* loaned was defective physically (*e.g.* counterfeit coins or soured wine), the borrower had, of course, no duty to return anything better, and naturally he had no duty at all if he was ousted by a third party rightfully claiming title. If the borrower suffered because, *e.g.* of rotten food, he might well have delictual remedies — almost certainly so in the case of fraud or malice on the lender's part (*actio iniuriarum* or *actio doli* in appropriate cases); and perhaps some praetorian action on *damnum iniuria datum* lay where the lender had been negligent.

Once *traditio* had been made the obligation to restore the like amount arose and was quite indefeasible. If *X* borrowed money from *Y* and then, through no fault of his own, lost it, he still had to repay *Y*. *Traditio* made the *res* his and the rule, *res perit domino*, firmly placed all risk on him.

Mutuum was an institution of the *ius gentium* in the developed law and so could be contracted by anyone regardless of *commercium*. One special rule as to capacity did, however, arise by legislation. This was the *S.C. Macedonianum* which was passed in the reign of Vespasian. Like most *senatusconsulta* of the time it was a direction to the praetor and it operated by way of *exceptio* to defeat a claim for repayment. It was concerned solely with loans of money to a person under *potestas*. It had no application where the creditor was the victim of fraud or honestly mistaken as to the status of the debtor; nor where a *filius* had *peculium castrense* or *quasi castrense*, to the extent of such *peculium*; nor where though promised to a *filiusfamilias* it was not actually lent till after he became *sui iuris*; but if promised to one who was a *paterfamilias* it was subject to the law if it was paid when he was subsequently a *filiusfamilias*, *e.g.* by adrogation. The consent of the *paterfamilias* excluded the law, as did the loan's being for his use or for the reasonable use of the *alieni iuris* (a qualification not

unlike that in respect of necessities in the English law of infants' contracts). The *alieni iuris* and any surety for him were under a *naturalis obligatio*, and so could not recover money repaid, but the *paterfamilias* could sue the creditor to have such payment by the son returned. The *filius* could ratify the loan after becoming *sui iuris*, but not until then. Presumably a *condictio* on the loan would succeed if the *exceptio* were not pleaded.

2. *Commodatum*

Commodatum was a loan of a *res corporalis* for some specified use, e.g. a horse for a day's riding. The essence of the transaction was that it should be gratuitous: if the lender (*commodator* or *commodans*) were to receive any return for the loan, the contract would be *locatio conductio* (hire), or one of the innominate contracts if the return were not in money. *Commodatum* has been distinguished as far as possible from the innominate contract of *precarium* in the section on *possessio* in the law of property (*ante*, p. 170). Three examples will suffice for the present discussion: if *X* lends *Y* a book for a fortnight, it is *commodatum*; if *X* lends *Y* the book without a time limit and the book is a novel, then again it is *commodatum* because it will be assumed that the book is lent for a time reasonably long enough for *Y* to read it; if there is no time limit and the book is a reference work which might be useful to *Y* at any time (not just in a job he is engaged upon at the moment), then it may well be *precarium*, the implication being that *Y* can use it until *X* asks for it back. However, as has been seen, it is difficult to be sure of even such a criterion as this. *Commodatum* might be of land, but would be more usually of movables. It is distinguished from *mutuum* in that the *res* is merely to be used and returned, not consumed with an equivalent to be returned. Thus, ownership does not pass on *commodatum*; nor, as has been seen, does *possessio*; the borrower (*commodatarius*, as modern scholars call him) has only *detentio*.

If the borrower used the *res* for a purpose beyond that for which it was lent and he did not honestly believe the lender would consent, he committed theft (*furtum usus*). Moreover, whether it was theft or not, unauthorised use or taking the *res* on an unauthorised journey rendered the borrower liable for any damage or loss regardless of any fault on his part.

The loan would normally be for the benefit of the borrower, but it might be for the benefit of the lender (*e.g.* where *A* lends *B* a spade when *B* offers gratuitously to dig *A*'s garden over) or for the benefit of them both (*e.g.* where the garden belongs to them both). In the normal case the borrower would be liable to the lender for any *dolus* or *culpa* that resulted in loss or damage. The *culpa* involved was that termed *levis in abstracto* (*i.e.* a breach of the standard of care to be expected from a good manager of a household — the *diligentia boni patrisfamilias*). This standard of care was the highest known in Roman law and here it involved what was known as *custodia*, which was the duty to keep the *res* safe and sound. *Custodia* originated in the time when Romans looked upon consequences as evidence of negligence: if a thing was stolen, then due care had not been taken of it. This meant that the borrower was liable to compensate the lender for theft of the *res* (and perhaps for damage) and was not allowed to plead that he had not been negligent. In fact, *custodia* virtually meant that the borrower was liable for anything short of *vis maior*, a concept not unlike the English 'act of God' and including such various occasions as earthquakes, seizure by enemy forces, and armed robbery (*rapina*) — the latter, perhaps, a little surprising in English eyes, especially as ordinary theft was *casus minor* and not within *vis maior*. In classical times liability for *custodia* gave the borrower a sufficient negative *interesse* for him alone to be able to sue the thief. Under Justinian the lender did not have to seek his remedy only against the borrower: he was given the option either to sue the latter on the *actio commodati* or to sue the thief on the *actio furti*, thus releasing the borrower from all liability.

Where the loan was for the benefit solely of the lender, the borrower was liable only for *dolus* (intentional acts) and for recklessness (*culpa lata*), which was normally equated to *dolus*. (*Culpa lata* was probably a post-classical concept and it is not always easy to translate it: it often means gross or flagrant negligence. Again, the classical jurists would probably have settled the matter by saying that there was clearly *culpa* in the case and therefore there should be liability.) Where the loan was for the benefit of both sides, the borrower was liable under Justinian for *culpa levis in concreto* (breach of the standard of care that the man himself ordinarily showed in

respect of his own property — *diligentia quam suis rebus*). In classical times he may well have been liable only for *dolus*, as in the former case. The *culpa levis in concreto* was a typically practical idea: where one chose to embark on any venture along with another (*e.g.* perhaps in partnership), one could only expect him to behave as he normally would.

In all cases the liability of the borrower could be varied by agreement. Thus he could be made liable even for *vis maior* — virtually an insurance clause. At the other extreme he could be exempted from all except *dolus*, an exception upon which the Romans for moral reasons always insisted.

The borrower's main duty was, of course, to return the *res* at the end of the use or the period specified. He had also to hand over with it all fruits and accessories, unless, of course, it had been agreed that he should acquire them by a type of *traditio brevi manu*. To enforce the various duties the lender had the *actio commodati* (*directa* as it was called in later law), and, at least in the developed law, he had his *vindicatio* for the *res*; also an *actio furti* if the borrower misused it.

Normally the lender would be under no duty — that is why the contract is termed imperfectly bilateral. However, if the borrower had been put to extraordinary expense in respect of the *res*, he could claim any sum necessarily expended (*e.g.* medical expenses for a slave). This he would do in the usual case by exercising his *ius retentionis*, resisting the lender's *actio directa* by pleading the *bonae fidei* clause of the action (or by *exceptio* if the *formula in factum* had been used). He also had an *actio commodati (contraria)* if his *ius retentionis* was not available, the lender having recaptured, or if it was not sufficient, the sum being greater than the value of the *res*. The lender was also liable to compensate the borrower for any loss caused by a latent defect in the *res* of which the lender knew, and, if the lender benefited at all from the *commodatum*, probably also any of which he ought to have known. The borrower would have the *actio contraria* in this case, and perhaps even the *ius retentionis* also. If the lender claimed the *res* before the time agreed, the position is uncertain and may have varied from time to time. The *actio contraria* was certainly available under Justinian if the lender recaptured prematurely. Perhaps, in all periods, the borrower was entitled to refuse to give up till due time.

If the borrower was *in mora* (i.e. late) in handing back, then, unless he was exercising a *ius retentionis*, risk in respect of the *res* passed completely to him, as was the general rule in respect of *mora* in contracts.

Finally, it may be added that *res fungibiles* could be the subject of *commodatum*, provided the intended use did not involve consumption or alienation of the *res*; e.g. where fruit is lent for display purposes only.

3. *Depositum*

Depositum arose where one man, not necessarily the owner, entrusted to another some *res* for safe custody, the latter, as in *commodatum*, getting merely *detentio* of the object. As in *commodatum* the contract had to be gratuitous, otherwise the transaction became *locatio conductio operis*. It was a praetorian derivation from *fiducia cum amico*, as seen earlier. It would normally be for the depositor's benefit, and if the deposittee were to benefit in any way the contract would *pro tanto* be *commodatum*, or at least treated on the same principles as that contract. The depositor had the *actio depositi (directa)* to enforce the return of the object, with its accessories and fruits, on demand. Condemnation in the action for refusal to give up the thing made the deposittee *infamis*. This rule resulted from the betrayal of trust by one relied upon and was probably derived from the same rule in *fiducia*. The action also lay if the *res* was lost or damaged as a result of the *dolus* (and *culpa lata*) of the deposittee; because the latter did not benefit he would not be impliedly liable for ordinary negligence, but, as in *commodatum*, the parties could make any terms they wished, imposing 'insurance' liability at one extreme but never being allowed to exclude liability for *dolus* at the other.

The deposittee who used the thing left with him was guilty of *furtum usus* unless he acted *bona fide*, in which case he was bound to restore all profit which had accrued from the use. The deposittee had the *actio contraria*: (i) if the depositor failed to display *exacta diligentia*, i.e. the standard of care of a *bonus paterfamilias*; thus, if he made a deposit of something with a latent defect which he knew or ought to have known would cause loss to the deposittee; (ii) to recover any expenses he might be put to in keeping the thing. It is not certain whether the deposittee had a right of retention in the former

case, but he did for expenses, as in *commodatum*. However, Justinian either abolished or restricted this *ius retentionis*. Since he was not responsible for *custodia*, he could not bring the *actio furti*.

The *actio* had begun as a civil law, almost delictual remedy for double damages under the Twelve Tables. For some reason the remedy died out and was replaced by a praetorian *actio in factum* before the end of the Republic, the liability under it being now normally only for simple damages. Some time later, certainly before Hadrian, there arose an *actio in ius* with a *bonae fidei iudicium*. The two actions coexisted under Gaius, but it is not certain why the *actio in factum* should be retained when the *actio in ius* would appear to be the better remedy. It may be that the earlier action was used solely for failure to restore, thus making the depositor plead any defence specially by *exceptio* and so face a heavier burden of proof than under the *bonae fidei* action. It is all, however, most speculative. It is known that the development of an *actio in ius* out of one *in factum* occurred also in *commodatum*, probably very soon after, and on analogy with, *depositum*. A similar history may have occurred — earlier or later — in the case of *fiducia* and *pignus*.

The following were three exceptional cases of *depositum* —

(a) *Depositum miserabile* was where the deposit was made under urgent necessity, *e.g.* by reason of a fire or shipwreck. Here the depositor who denied the making of the deposit or was guilty of *dolus* was liable in double damages.

(b) *Depositum irregulare* was where a *res fungibilis* (usually money) was entrusted by one man to another, usually a banker, on the understanding that the depositor was to become owner, and was only to be bound to restore its equivalent in value. In this case the depositor, becoming *dominus*, was liable even for loss by mere accident, but the transaction differed from *mutuum* because — (i) it was chiefly in the interest of the depositor, though the depositor normally had the right to use the money; (ii) interest could be claimed by the *actio depositi directa*, which was *bonae fidei*, whereas in the case of a loan by *mutuum*, interest was, as above stated, not recoverable in the absence of an express stipulation; (iii) the *S.C. Macedonianum* did not apply; (iv) there was the extra sanction of *infamia*; (v) interest would automatically accrue where the depositor

was in *mora*. The institution was almost certainly post-classical.

(c) *Depositum* with a *sequester* (*sequestratio*) by several persons jointly has been already mentioned as one of the exceptional cases where a person with a mere derivative title under a contract acquired *possessio*. It applied to land as well as movables, the purpose of the transaction being that the *sequester* should hold possession till some dispute or lawsuit concerning it was settled, when it was to be returned to the party in whose favour the decision was given. There was a special action in this case — the *actio depositi sequestraria*.

4. *Pignus*

This contract and its incidence has already been fully discussed under the topic of real security in the law of property.

(B) Contracts made *Verbis*

As already seen, it is the form of words used that creates the liability, but in the developed law the form alone was not sufficient to raise the *obligatio* if there was no *consensus*. Besides the three contracts to be described there existed two institutions which were solemn promises or declarations of intention that were enforceable in Roman law. These were the *votum*, a vow made to a god (and perhaps, in Christian times, even to a religious foundation), and the *pollicitatio*, a promise to effect some public work, usually in a *municipium*. Neither are institutions of the private law, the one being founded presumably on *ius sacrum*, the other on *ius publicum*. In each case there was perhaps a set form of words used.

The three private law verbal contracts were: 1. *dotis dictio*; 2. *iusiurandum liberti*; 3. *stipulatio*.

1. *Dotis dictio*

This was a unilateral declaration that constituted a *dos* and it was available only for such a purpose. It is an interesting institution in that, whilst it required the presence of both promisor and promisee, the solemn words were spoken by the promisor alone, the promisee for once being the silent one. It was normally made before marriage (at the *sponsalia* ?), and originally, perhaps, only then, but later it could be made after.

It applied to any property and so could release a debt owed by the bridegroom. It could be made only by the bride or her *paterfamilias* or the bride's debtor. If anyone else wished to promise a *dos* legally he had to use a *stipulatio*, with the groom, of course, stipulating. It was obsolete by Justinian.

2. *Iusiurandum liberti*

Iusiurandum liberti was another verbal obligation which arose from a unilateral declaration as opposed to the question and answer of the *stipulatio*. It too was a special case. On manumission it was normal for the manumitter to reserve the right to services (*operae*) from the freedman. The right was constituted by an oath made by the slave in due form before manumission and then repeated immediately he was free. The first oath is thought to have had only religious force, yet it is difficult to see why it was taken at all unless it had some legal force to oblige the promise made after manumission. The sanction for the completed obligation was a *stricti iuris* action, the *iudicium operarum*, very like a *condictio certae rei*. It became more and more customary for the undertaking to be given, not by the *iusiurandum*, but by *stipulatio* in normal form after manumission with, however, the oath preceding freedom still exacted also.

3. *Stipulatio*

This was probably the single most important institution developed by Roman law. It permeated the whole law of contract and was of vast importance in the law of procedure, as well as greatly affecting the whole law of property. It was a formal act, yet the simplest of forms, and as such it could be used to effect any legal transaction. Provided both parties could speak and understand, all that was necessary was that they were both present during the contract.

The origin has been variously conjectured, but it remains distressingly obscure. It certainly existed at the time of the Twelve Tables, at least in its earliest and most solemn form, the *sponsio*: the *lex* provided the new *legis actio per iudicis postulationem* to enforce such an obligation. It was probably enforceable *per sacramentum* before that. The form of *sponsio* (with the question posed by '*spondesne?*' and answered by '*spondeo*') suggests a religious origin — the same terminology

was used to effect solemn treaties with other nations. The fact that throughout history this remained the only form restricted solely to those with *commercium* seems to indicate it as an ancient customary form that came to be enforced by *ius civile*. The fact, also, that the terms '*sponsio*' and '*sponsor*' were always pre-eminently indicative of suretyship gives cause to think that the first occasion for legal enforcement of the stipulation was in respect of suretyship where one party agreed to stand liable for another's obligation. This occasion could well have been the suretyship that was so important in the early law of procedure, viz. in the *legis actio per sacramentum*. Certainly the stipulation remained the core of the law of suretyship.

Whatever its origin, it is clear that the *stipulatio* became more and more popular as the Republic wore on. In the mid-Republic the *condictio* was introduced by the *leges Silia et Calpurnia* and thereafter that remedy appears to have become normal for the *stipulatio*, and under the formulary system the *condictio* was again the action for most stipulations. However, before this, two most important developments had occurred. Firstly, other forms than *spondesne?* — *spondeo* had become recognised — perhaps, even at the time of Twelve Tables in the case of the *fidepromissio*, a form that seems very ancient. Secondly, all these developed forms, even the *fidepromissio*, were always, or somehow became, recognised as being valid and enforceable when made by peregrines. This establishment of the stipulation as mainly a *iure gentium* institution was of extreme significance: it laid virtually the whole field of contract, formal and informal, open to all and it made the stipulation a vehicle for all commercial transactions.

(1) *The nature and form of a stipulation.* A stipulation was a contract which imposed an obligation upon a person because he had answered in set terms a formal question put to him by the promisee, that question containing a statement of the subject matter of the promise. It was unilateral and *stricti iuris*. An example makes this clearer. Titius means to promise to give Maevius his slave Stichus. If he merely says to Maevius, 'I promise to give you Stichus', there is no contract. For a proper stipulation Maevius must ask Titius, '*Spondesne mihi hominem Stichum dari?*' and Titius must answer '*Spondeo*'.

Besides the form *spondesne? spondeo* ('do you pledge your word? 'I do pledge it') Gaius mentions the following: *dabisne? dabo* ('will you give?' 'I will give'); *promittisne? promitto* (promise); *fidepromittisne? fidepromitto* (give one's word); *fideiubesne? fideiubeo* (guarantee); *faciesne? faciam* ('will you do?'). He also allows certain Greek words which are obviously meant as exact translations of all the above with the exception, of course, of the *spondeo* form which was confined to Romans. It is disputed whether these were the only forms in his time or were just examples. If the former is true, as seems just the more likely, one or two other forms may have been admitted before the end of the classical period. However, a rather conservative view seems the more probable for the whole classical period: (i) only Greek was allowed besides Latin and it was not possible for one leg to be in Greek and the other in Latin, even if the translation was accurate; (ii) there had to be exact congruence in form as well as in intention: e.g. '*dabisne? dabo*' was valid, '*dare promittisne? dabo*' was probably not (except, perhaps, at the end of the period). Later the forms broke down: it is even suggested that by Justinian's time any expression of intent by the parties (*inter praesentes?*) was a stipulation, whatever the form. However, a less radical view seems preferable. A very baffling constitution of Leo in A.D. 472 is best taken as doing away finally with the need for any set words and for formal congruence in question and answer. This enactment may well have been in no way revolutionary — it may just have settled some lingering doubts raised by a case or by a scholar long after a general relaxation had begun.

Under Justinian the position seems to be this: (i) any language can be used provided both parties understand and the question and answer may be in different languages; (ii) there has long been no need for the use of any set words; (iii) there is no need for any formal congruence, e.g. '*dabisne?*' may be answered '*quidni*' (certainly); (iv) there must still be an oral question and an oral answer that is congruent with it in sense — thus a nod of affirmation is insufficient for an answer; (v) the parties must still be present. At all times there was never a need for the promisor to repeat the substance of the promise or promises: all he had to do was answer with the promissory word or expression.

It would early have become a practice to make a whole set of stipulations to constitute one lengthy contract or, perhaps, sometimes to recite a series of demands and then to pose them in bulk in one stipulation. As will be seen, stipulations could be made conditionally and in this way it was possible to make interdependent stipulations and thus to make the whole transaction bilateral in fact, though still *stricti iuris* and, in form, unilateral.

Besides the question of raising the obligation there is the very practical one of proving it. This would be impossible without witnesses, and to be safe one would need several reliable ones. Perhaps the stipulations that became common as warranties of title and against defects in sales in the Roman market were made before the *aedile* or one of his officials. However, there was never any legal requirement as to witnesses — it was safely left to the prudence of the canny Roman. A practice grew up in the Republic whereby the stipulation was recorded in writing, and it was very common by the time of Cicero. This writing came to be called '*cautio*', and its name shows it to be one of the principal documents that *iurisconsulti* had to draft in the function of *cavere*. The *cautio* might be made after the oral acts had been completed or, in time, beforehand with the stipulation merely referring to and ratifying the writing. In any event, it was normal to insert either after each promise or, eventually, at the end some clause showing an oral stipulation to have taken place; e.g. *rogavit A, fide promisit B*. Such a clause would soon be accepted as *prima facie* evidence of a stipulation, and the presumption would gradually become stronger. Later, perhaps still in classical times, a writing would be accepted as a *cautio* even though the clause recorded only a promise without any preceding question. In theory it was all a question of evidential presumptions and the oral form was still essential, but by Justinian's time it seems that the only sure means for upsetting the written record of a promise was to prove that the parties had been absent from each other and could not have met on the date of the writing.

The purely oral stipulation was probably still common in the time of Gaius, but the *cautio* was almost certainly more frequent. Moneylenders and business men would have worked out their own formulas for specimen contracts and their set

forms would be used for most of their transactions and, where necessary, varied. Standard forms of contract, not unlike our own, must have existed. Moreover, another impetus was present. Gaius, in discussing the literal contract, mentions that written agreements (*syngraphae* and *chirographa*) were regularly enforceable amongst peregrines in his time. These agreements were Greek in origin and during the Empire they must gradually have converged on the *cautio*, the peregrines often inserting the 'promissory' clause at the end of the writing. In Byzantine times, Greek preference for written evidence gradually made the *cautio* paramount, and the oral stipulation probably remained just a theoretical possibility, rarely, if ever, resorted to under Justinian.

Stipulations were used for all sorts of obligations. They could promise payment of money; delivery of a specific article, whether or not yet in existence; delivery of a certain amount of a generic commodity, usually *res fungibiles*; performance of an act; forbearance from an act. The remedies were *stricti iuris*: the *condictio certae pecuniae* (*actio certae pecuniae creditae*) for money; the *condictio certae rei* for specific or generic articles (called *condictio triticaria* post-classically — the name, derived from grain contracts, refers truly only to the generic articles but was used for any case *certae rei*); and the *actio ex stipulatione* (or *ex stipulatu*) for an act or forbearance — not the *condictio incerti*, which was a special action introduced later in the quasi-contractual sphere. (An interesting parallel occurs in early English law: the writ of debt was the remedy for a covenant promising money, the writ of covenant only for one promising an act or forbearance.)

A stipulation might be made simply (*pure*), or with a time named for performance (*ex die*), or conditionally. If made simply, 'Do you promise to give me five *aurei*?', the obligation to pay the money and the right of the creditor to demand it arose at once. If made *ex die*, e.g. 'Do you promise to give me five *aurei* on the Ides of March?' or 'when *X* dies?' (i.e. an event certain to happen, but uncertain when), the obligation to perform on the day or event named arose at once, but the creditor could not demand it until the day arrived, and the whole of the day was allowed for payment. Under the rule *ad diem deberi non potest*, one cannot owe a thing up to a certain time and not thereafter, e.g. 'Do you promise to pay me ten

aurei until the kalends of July?' The stipulation was construed as free from the limitation, but if action were brought thereafter it could be met by the *exceptio doli*. A promise to pay 10 *aurei* each year during the life of one or either party was unconditional and perpetual; if, however, an action was brought after death, it could be defeated by the *exceptio doli*. A stipulation made subject to a suspensive condition (e.g. 'Do you promise to give me five *aurei* if Titius is made consul?') did not give rise to an actionable obligation, but only to a hope (*spes*) that the promise would become effective by the condition's being fulfilled; but this hope passed to the heirs of the promisee if the condition was not satisfied until after his death (contrary to the rule in legacy). A negative condition (e.g. 'if *X* does not become consul') was struck out, being treated as resolute (*i.e.* 'until *X* becomes consul'), but as with stipulations *ad diem* the promisor was probably protected by a *condictio indebiti* if the promise had been validly enforced before *X* became consul (as it could be), and certainly by an *exceptio* if he were sued afterwards. A negative condition involving the promisor, e.g. 'if I do not go up to the Capitol', was treated by Justinian as a promise to perform 'when I die' if it had not been broken earlier. If a condition related to some event which had taken place, e.g. 'if Maeivius is dead', but which was unknown to the parties, it did not delay the formation of the obligation; the stipulation in such case amounted to a kind of bet. If Maeivius was alive the stipulation was void; otherwise the stipulation became at once effective.

Where a stipulation was, not that a definite thing should be given or payment made, but for some act (e.g. to teach Greek) or forbearance (e.g. not to go to Rome), it was usual to add a penalty, *i.e.* to fix a sum as liquidated damages; e.g. 'Do you promise to go to Rome?', 'I promise'; 'And if you do not go do you promise to pay me ten *aurei*?', 'I promise'. It is possible that originally a stipulation applied only in the case of a promise to pay a definite sum of money and that, when it had for its object anything other than a money payment, the promise had to be made conditional on a money penalty. The Romans had no rule in respect of liquidated damages allowing the court to relieve against an unfair penalty, as in English law, and the practice not only

had the advantage of making it unnecessary for the plaintiff to prove the value to him of the promise, it also enabled him to sue by *condictio certae pecuniae* instead of *ex stipulatu*.

Stipulatio could be used to effect any transaction, even those that were the subject of informal contracts, such as the real *mutuum* and the consensual sale or hire; and, of course, the liability was *stricti iuris* and the remedies those of stipulation. It was also common for stipulations to be entered into to supplement informal contracts, e.g. for interest in *mutuum*, and they were even used instead of actionable *pacta adiecta* in the consensual contracts. The importance of *stipulatio* in the field of suretyship will be seen under the head of joint debtors.

One other important function must be mentioned — novation. Novation implies the extinction of a former obligation and the substitution of a new one. *A*, e.g., owes *B* ten *aurei* on a contract of sale (*emptio venditio*). The obligation to pay can be novated if *B* asks *A*, '*Spondesne mihi decem aureos dari?*' and *A* answers '*Spondeo*'; whereupon *B* obtains a better remedy to enforce payment, and, as a matter of evidence, need only prove that the stipulation was made; i.e. he is not forced, if *A* questions it, to prove that the sale really took place. A novation may even involve a change of parties: *A*, e.g., owes *B* ten *aurei*, *C* engages to pay the money, and *B* agrees to accept *C* as his debtor. *B* asks *C* if he will pay the ten *aurei* owed by *A*, and *C* engages to pay it (*expromissio*); whereupon *A*'s old obligation to pay is extinguished, being replaced by the new obligation imposed on *C*. *C* is not likely to pay unless he owes money to *A*; in this, the usual case, *A* is substituting his debtor, *C*, to pay his own creditor, a case of *delegatio debitoris*, which is an *expromissio* in the stricter sense of that term.

Justinian tells us that stipulations were classified as either judicial, praetorian, conventional or common, i.e. both praetorian and judicial. Judicial, praetorian and common stipulations are instances of stipulations made under compulsion in connexion with legal proceedings; if judicial, on the authority of a judge; if praetorian, on the authority of the praetor (there could also be aedilician ones on the aedile's authority); if common, on the authority sometimes of the praetor, sometimes of the judge; and all three kinds are

analogous to the English practice of requiring persons to 'enter into recognisances', *e.g.* to keep the peace or to appear before the Court for judgment.

The examples given by Justinian of judicial stipulations are —

(a) The *cautio de dolo*, by which a defendant who was ordered to restore to the plaintiff some of the property of the latter, was obliged to undertake that he would yield it up without fraud, *i.e.* do nothing before delivery to lessen its value.

(b) The *cautio de persequendo servo qui in fuga est, restituendove pretio* was entered into by a defendant who had been given possession of the plaintiff's slave prior to the slave's escape, and the object of the *cautio* or stipulation was that the defendant should follow and reclaim the slave from any third party or pay to the plaintiff the slave's value.

The examples given of the praetorian stipulations are —

(a) The *cautio damni infecti*, by which a man whose property was likely to injure a neighbour by reason of its dangerous condition was compelled to give security to indemnify his neighbour against any ensuing damage; if the *cautio* were not duly entered into the praetor might give possession of the property to the person whom it seemed likely to injure, which, after an interval, might become permanent if the owner of the dangerous property continued recalcitrant.

(b) The *cautio legatorum* was that which the heir was compelled to enter into when a legacy was not at once payable, *e.g.* had been given conditionally; the legatee being entitled to have its future payment duly secured by the promise not only of the heir but of sureties. If the security were not forthcoming the legatee could claim possession of the legacy at once.

Justinian's examples of common stipulations are —

(a) *Rem salvam fore pupilli*, which was sometimes taken by the praetor and sometimes by the *iudex*, to ensure the safety of the property of a *pupillus*.

(b) *Rem ratam haberi*, which was the stipulation entered into by an agent (*procurator*) who was conducting a lawsuit for another, undertaking that the principal would ratify the agent's acts.

Finally, conventional stipulations were those entered into by agreement of the parties, the common form of stipulation.

(2) *Invalid stipulations (Inutiles stipulationes)*. A stipulation was void in the following cases —

(i) If impossible *ab initio*, e.g. to give a slave, Stichus, who is dead; a hippocentaur, which cannot exist; a thing which is *divini iuris* or otherwise *extra commercium*; a freeman wrongly considered a slave; or something which already belongs to the promisee. And if void *ab initio*, the stipulation cannot become valid because its object subsequently becomes possible, e.g. the freeman becomes the slave of the *promissor*. Even a stipulation in the form, 'Do you promise to give Titius (a freeman) when he shall become a slave?' was void on the same grounds; such an attempt at validity by condition seems likely to have infringed Roman notions of public policy. Conversely, although the stipulation was originally possible it is avoided by subsequent impossibility, unless the impossibility is attributable to the fault of the *promissor*.

(ii) If *A* promised *B* that *C* should do something for *B*'s benefit the stipulation was in strict law void, for a third party can acquire neither rights nor duties, the limits of the contractual obligation being confined to the actual contracting parties: *res inter alios acta aliis neque nocere neque prodesse potest*; but, exceptionally, *A* would be liable — (a) if his promise were construed as an undertaking that he would be personally responsible that *C* should do the act; (b) if *A*'s promise were that if *C* did not perform the act *A* would pay a penalty; and *C* might be liable — (a) in certain cases by an *actio adiectitiae qualitatis* (*post*, p. 373); (b) under Justinian's law, if he were *A*'s heir.

(iii) Another consequence of the last-mentioned maxim was that a promise made by *A* to *B* that he would benefit *C* was void, but, exceptionally, *B* could enforce the promise — (a) if *B* had an interest in the performance, e.g. *C* was his creditor; and (b) if *A* engaged either to do the act or to pay a penalty. So also, *C* might exceptionally enforce *A*'s promise, e.g. (a) if he were *B*'s *paterfamilias* or *dominus*; (b) if, under Justinian, the promise were in favour of *B*'s heir and *C* filled that position; and (c) if *B* had taken the stipulation with reference to the property of *C* (his ward), *C* might have an *actio utilis*. (Certainly an *actio utilis* lay against a pupil on attaining puberty on a contract made by his guardian.)

(iv) In the case of a stipulation *mihi aut Seio dare spondes*?

the stipulator alone had the right to sue, but payment might be lawfully made to Seius even against the stipulator's will, and the obligation of the debtor thereby ceased, while the stipulator could recover from Seius by an *actio mandati*, the mandate being presumed from the circumstances of the case. (The situation would normally arise where the promisee might foresee difficulty in taking payment personally.)

(v) A stipulation *mihi et Seio*, Seius being the *paterfamilias* or *dominus* of the promisee, was for the benefit of Seius; if Seius was a stranger there was a dispute between the schools; the Sabinians held that the whole was due to the stipulator, the Proculians that he was entitled to half only, the stipulation being void as to the other half. Justinian confirmed the latter view.

(vi) A stipulation was void where the parties were not in exact agreement in the question and answer; *e.g.* if the question was absolute and the answer conditional; but if the stipulation was for quantities, a promise for a less quantity was binding under Justinian and perhaps in Ulpian's time; *e.g.* 'Do you promise ten *aurei*?', 'I promise five *aurei*'.

(vii) A stipulation was void if an impossible condition was added to it, *e.g.* 'Do you promise me ten *aurei* if I touch the sky with my finger?', but if the stipulation was, 'Do you promise me ten *aurei* if I do not touch the sky with my finger?', the condition was disregarded and the stipulation valid.

(viii) A stipulation *inter absentes* was, as we have seen, void, but, under a constitution of Justinian, if the contract had been reduced to writing and the writing stated that the stipulation had been made by the contracting parties in the presence of each other, this raised a presumption that they had been present, which could only be rebutted by the clearest proof that the parties were in different places during the whole day on which the contract was alleged to have been made.

(ix) A stipulation 'when I die' or 'when you die, do you promise to give?' was valid even in the time of Gaius, for here the right or duty vested at the last moment of life, and so could be inherited by the heir. However, a promise to give after one's own or the promisee's death was invalid for Gaius, because the obligation would start with the heir. Strangely enough, a promise to give, *e.g.* 'the day before I die' was treated as void for the same reason. But if *A* had acquired

a right or incurred an obligation under a stipulation, the heir would be entitled or bound (although in early law, perhaps, the obligation was so personal that it died with the parties); the right or obligation would pass to him under the normal rules of succession. For Gaius a stipulation by a *filius* or *servus* for payment after the death of the *pater* or *dominus* was also void, because the right under the promise vested with the *potestas*. Justinian made all these stipulations valid in accordance with his practice of treating the heir as extending the deceased's personality.

(x) Formerly also, a stipulation *praepostere concepta* was void, e.g. 'If the ship *Barbara* arrives next Monday from Asia, do you promise to give me five *aurei* today?' Justinian made such a contract valid, but performance could not be demanded until the condition was fulfilled. (The invalidity of 'the day before I die' clause may originally have been due to this rule.)

(xi) So too a stipulation *ex turpi causa*, i.e. tainted by illegality or immorality, e.g. a promise to commit homicide, is void.

(3) *Joint debtors and creditors*. A promise could be made by means of a stipulation to two or more persons (*adstipulatores*), and two or more persons (*adpromissores*) could jointly make a promise, by *stipulatio*, to another. In each case the whole thing promised was due to each stipulator and from each *promissor*. But in each obligation there was only one thing due, so that if either of the joint parties received or gave the thing due the obligation was at an end.

(a) *Adstipulatio* was chiefly used in early law for the purpose of agency, the *legis actio* system not allowing representation in litigation. *A* is making a contract with *B* and wishes to guard against not being able to see it carried out, e.g. because he is going abroad. Instead, therefore, of merely making the stipulation himself with *B*, he gets *B* to promise the act to himself and *C*. *A* asks *B*, '*Spondesne . . . ?*', then *C* asks the same question, and *B* replies, '*Spondeo*'. *C* is, of course, more than an agent; he is one of two principal creditors, and can sue *B* in his own name; but *C* is bound, as regards *A*, not to abuse his rights, and he must make over to *A* whatever he recovers from *B*. The *lex Aquilia* in its second chapter provided a penalty against the *adstipulator* who released the

debt; the conversion of the payment from *B* was probably sanctioned by the *actio furti* or by a stipulation between *A* and *C* in early law, and an *actio mandati* lay to enforce it by the time of Gaius. The obligation to *C* was removed by his death or *capitis deminutio*, but here, unlike the case of release, the principal debt to *A* still remained.

Another use of *adstipulatio* was to evade the rule which, prior to Justinian, prohibited a stipulation so expressed as to take effect only after the death of the parties. If, e.g., *A* wished that *B* should make payment after *A*'s death to his (*A*'s) heir, *A* and *C* would jointly take a stipulation from *B*. Then if *C* survived he could sue on the stipulation and was bound to account to *A*'s heir for what he recovered. *Adstipulatio* was superseded by the contract of *mandatum* and was entirely dead by Justinian's time.

(b) *Adpromissio* or joinder of debtors was chiefly used for the purpose of suretyship or guarantee, the essence of which, according to the modern conception, is that *C* (the surety) promises to pay or perform *A*'s debt or other obligation to *B* if *A* does not. In the time of Justinian the only manner of constituting suretyship by a verbal stipulation was *fideiussio*. The two earlier forms mentioned by Gaius, *sponsio* and *fidepromissio*, had become obsolete in Justinian's time.

Sponsio, which applied only where all the parties were *cives*, was formed by the use of the words *Spondesne? Spondeo*. *Fidepromissio* was not confined to citizens, and the words used were *Fidepromittisne? Fidepromitto*; both forms were only applicable where the debt which was being guaranteed was itself created by *stipulatio*, and in neither case was the heir of the surety liable. The following laws, of unknown date, applied to these two forms of suretyship, the first to *sponsio* only —

(i) A *lex Publilia* provided that a surety by *sponsio* who had been compelled to pay the debt could recover twice the amount of the debt by the *actio depensi* from the principal debtor who failed to repay him within six months.

(ii) A *lex Apuleia* provided that, where there were several sureties and one had been obliged to pay more than his fair share, he might by an *actio pro socio* recover the excess from his co-sureties.

(iii) A *lex Furia*, which did not apply to sureties outside

Italy, limited the liability of sureties to two years from the date of the contract and provided that each should be liable only for his own share.

(iv) A *lex Cicereia* required the creditor to inform an intending surety of the amount of the debt and the number of sureties, and a *lex Cornelia*, 81 B.C. (which, unlike the above laws, also applied to *fideiussores*), provided that no one should become surety for the same debtor to the same creditor in the same year for more than 20,000 sesterces, the excess only being void.

Fideiussio, which was the sole means of creating suretyship by stipulation in Justinian's time, and which must have dated back at least to 81 B.C., since the *lex Cornelia* of that year applied to it, was formed by the use of the words *Fideiubesne? Fideiubeo* (and perhaps other forms, e.g. *idem dabisne? dabo*), and not only was the surety bound, but his heirs also. An obligation could be guaranteed by this method whatever its nature; i.e. though it arose from some other form of contract than a stipulation, and even though it arose from delict. Further, the main obligation might be a *naturalis obligatio* merely and might even be guaranteed by anticipation. Each surety (*fideiussor*) was liable for the whole debt, and the creditor might therefore demand it from any one of the sureties he pleased, but an action taken to *litis contestatio* (or, after Justinian's changes, to judgment) against one released all. Before Justinian, there was no necessity for the creditor to sue the principal debtor before the sureties, though this would be the delict of *iniuria* if the principal was able to pay, since it was a reflection on his solvency. Justinian, by a Novel, introduced the *beneficium ordinis* (or *excussionis* or *discussionis*), by which a surety could demand that the creditor should sue the principal debtor before proceeding against him, but such action did not release the others. A surety who had been compelled to pay could recover from the principal debtor by the *actio mandati*.

As between the sureties themselves a rescript of Hadrian introduced the *beneficium divisionis*, which enabled one of several sureties when sued for the whole debt to demand that the claim should be divided between himself and the other solvent sureties. (This remedy was not so favourable as that given to sureties by *sponsio* or *fidepromissio* by the *lex Furia*,

since under that law the liability was automatically divided among all sureties, whether solvent or not. A *fideiussor*, on the other hand, had to claim the *beneficium divisionis* expressly and was affected by the fact that some might be insolvent.) Also by the rescript, a surety called upon to pay the whole debt might avail himself of the *beneficium cedendarum actionum*, i.e. require the creditor before payment to hand over to him all his remedies (including mortgages to secure the debt), and so, standing in the place of the creditor, sue the principal debtor for the amount paid, or the other sureties for their fair share; he was regarded, not as having paid the debt, but as having purchased the right of the creditor. The cession of actions against the principal debtor had to be made before the surety's payment because that payment would automatically have extinguished all the creditor's rights against the principal. A surety of any of the three kinds could in no case be bound to pay more than the principal debtor, but might engage to pay less or to pay conditionally. A similar rule was true of *adstipulatio*. Besides these three forms of stipulation suretyship could arise, as will be seen, from (i) *mandatum qualificatum* and (ii) the praetorian *constitutum debiti*.

By virtue of a *S.C. Velleianum* (A.D. 46), suretyship or other *intercessio* (which included taking over a debt by novation) by women was forbidden, and a female surety, if sued on her promise, could accordingly plead the *exceptio S.C. Velleiani*. But the statute did not apply where the woman had been guilty of fraud, or where the object of the main stipulation was to provide a dowry for her daughter, or where the creditor was a minor and the principal debtor insolvent, or where it was for her benefit, or where she had deceived the creditor, or where she acted to save her father from the consequences of a judgment. Justinian retained these provisions, but required, in addition, that an *intercessio* by a woman should be in writing and executed before three witnesses, unless given for value received or to provide a dowry, or unless she had been paid for it or confirmed it after two years, otherwise it was to be absolutely void; also that in no case should an *intercessio* for a husband be valid.

The frequency of legislation in relation to suretyship bears witness to the common occurrence of that contract, and to the necessity of protecting those who were required by the

social opinion of the times to accept the burden of suretyship. The personal security of suretyship was always more popular with the Romans themselves than real security. In the Byzantine period Greek and Oriental influence made real security more frequent, especially as the *hypotheca* developed, but it is fair to say that the Romans tended always to use sureties far more than the English do today.

Besides *adstipulatio* and *adpromissio* it was quite possible for a stipulatory contract to be made with more than one creditor and with more than one debtor. This was where just one thing or performance was owed by or to a number of persons, and such an obligation is known as solidarity, each person being liable for the whole (*in solidum*). Cases of solidarity were mainly of importance in the sphere of discharge of contract and the matter will be dealt with there (*post*, p. 391).

(C) Contracts made *Litteris*

Though an obligation could be created by a literal contract in the time of Gaius, the so-called literal contract of Justinian was not, in itself, a means of *creating* an obligation, but was the *evidence* of an obligation created in some other way, though this evidence might, by a kind of estoppel, become conclusive. Justinian, therefore, is perhaps rather illogical in classifying contracts *litteris* as a means of creating an obligation.

1. The true literal contract

The true literal contract, as described by Gaius, was a means of creating an obligation to pay money apparently by a fictitious entry (*expensilatio*) in the creditor's account book called the *codex accepti et depensi*, with the consent of the intended debtor. *A*, with *B*'s consent, enters the fact that *B* is indebted to him in fifty *aurei*, and thereupon *B* is under an obligation to pay, though no money has passed between them. Whilst Gaius describes the main effects of the entries he gives very little help on the background and other details of the subject, and other sources add little that is definite. Even the assigning of the entry to the *codex*, which was the book that the normal *paterfamilias* assiduously kept for the household accounts, is based upon conjecture from Gaius's nomenclature; the consent, too, of the various debtors is also

assumed as a matter of common sense ; it is even possible that the entries might have been of other things as well as of money. It must, therefore, be made clear at the outset that the account here given, though basically the one most accepted by scholars, is to a large extent incapable of proof and also much controverted by some.

The entry might be one of two kinds —

(i) *Nomen arcarium* ; *i.e.* a statement that money had actually passed between the creditor and the debtor, in which case no obligation *litteris* arose ; the entry was merely evidence of the debt, and the debt, being actual, was sufficient in itself to create an obligation, with the very adequate remedy of a *condictio certae pecuniae*.

(ii) *Nomen transcriptitium*. An entry by *nomen transcriptitium* was where a creditor closed one account in his *codex* (*accepti relatio*) and opened a new one (*expensilatio*), and it was probably only under these circumstances that an *obligatio litteris* arose.

The subject will, perhaps, become clearer by examples —

(a) *A* advances *B* money by way of loan (*i.e.* on a *mutuum*), and enters the loan in his *codex*. The obligation on *B*'s part to repay arises on the *mutuum* and is enforced by the *condictio* to which that contract gives rise ; the entry is merely *nomen arcarium*, *i.e.* evidence of the real contract upon which alone the obligation depends.

(b) *A* has in the past had dealings by way of sale, exchange, etc., with *B* and an account appears in his *codex* showing a balance against *B* for 500 *aurei*. *A*, with *B*'s consent, closes this account by a statement on the opposite page (contrary to the fact) that *B* has paid the *aurei* (*accepti relatio*) and opens a new account with the statement (contrary to strict fact) that he has advanced to *B* the sum of 500 *aurei*. Hence the *expensilatio* represents a *nomen transcriptitium* ; a *nomen* (debt) has been transferred from one account to another, and, if the transaction was with *B*'s express or tacit consent, *B* is, by virtue of the new entry merely, bound to pay the money. In effect, the old contracts between *A* and *B* have been novated, *i.e.* extinguished, one single obligation having been substituted in their place ; obviously a course which offered many advantages to both parties, as it simplified the accounts and saved disputes about the previous transactions. And if the previous

transactions had been contracts *bonae fidei* (e.g. *emptio venditio*), the creditor acquired a far better remedy in the *condictio* by which the literal contract, which was *stricti iuris* and unilateral, was enforced. It has been suggested, with some probability, that this procedure dated from before the law came to recognise and enforce the consensual contracts; if so, it would have then been an original source of obligation, not just a novation.

(c) *A* has an account with *B*, the result of which is that *B* is indebted to him in 1000 *aurei*; he is unwilling to give *B* further credit, but will accept *C* as debtor in lieu of *B*, and *C* at *B*'s request agrees. *A* makes an *accepti relatio* to *B*'s account, and transfers the unpaid debt (*nomen*) to the opposite side of his *codex* by means of an *expensilatio*, which states (contrary to the strict fact) that *C* is indebted to him in 1000 *aurei*, whereupon *C* becomes bound *ipso nomine*.

The technical name for the transcription in case (b) was *transscriptio a re in personam*, in case (c) a *persona in personam*. These last examples, (b) and (c), are the only instances of the true literal contract which Gaius gives.

It would appear, therefore, that the normal use of the literal contract was for the purpose, not of creating a new, but of novating an existing obligation, as in the two cases cited, and it is perhaps a little artificial to say that the essence of the transaction is that the obligation springs from the entry of a fictitious loan. It is true that if there were an actual present loan the transaction was a *nomen arcarium* (i.e. evidence of a *mutuum*), and not a literal contract at all. But in neither of the cases (b) and (c) was the entry fictitious, in the sense that the person upon whom the obligation was imposed received no benefit. If it was a *transscriptio a re in personam* he had, in the past, received abundant consideration from the creditor; while in the case of the *transscriptio a persona in personam* the benefit *C* received was a present one, viz. the release of his friend or perhaps creditor, *B*, from liability. That the literal contract was not, or was rarely, used to create an original obligation is the less surprising when it is remembered that a gratuitous obligation to pay money could always be created by a simple *stipulatio*, and that in time, a mere written promise to pay raised a presumption that a stipulation to that effect had been duly made. Of course, if a man wished to benefit

a friend or relative there was no reason why he should not instruct him to make a fictitious *expensilatio*, in which case the entries would be wholly fictitious and nevertheless binding; but, obviously, this would be so much more cumbrous than a stipulation that it would be rarely resorted to. It did, however, have one advantage over the *stipulatio*: it could be made in the absence of the debtor.

There is no further evidence on the institution, but still many puzzling questions. Presumably it would be normal for the debtor to make a corresponding entry in his own *codex*, but it seems to be only the entry in the creditor's book that mattered. What means were taken to ensure that the entry was not fraudulent and was an accurate statement of the contract are unknown: some method seems essential. Perhaps a written receipt by the debtor was inserted into the *codex* (by sewing?).

The institution probably began in the middle to the end of the Republic and was still in some use through most of the classical period. Perhaps by that time it was mostly confined to the account books kept by bankers. It was primarily a *iure civili* institution, based on the Roman citizen's book-keeping methods, but according to Gaius a peregrine could, on one view, be a *debtor* in a *transscriptio a re in personam*, but not otherwise a party of any sort.

The literal contract had long been obsolete by the time of Justinian, the books being no longer kept. Its loss was not likely to have been felt: the growth of the praetorian *pactum*, the *constitutum*, provided a more easily handled and just as effective substitute.

Gaius also mentioned that in peregrine law *chirographa* (written in the debtor's own hand) and *syngraphae* (witnessed documents sealed by both parties) created a literal obligation. They were very common Greek institutions, and, whilst they had no direct force in Roman law, they had, as we have seen, a considerable effect on the history of the *cautio*.

2. The so-called literal contract of Justinian

As already seen, after about A.D. 200 a promise to pay money which was in writing (*cautio*) raised a presumption that the promise was the result and evidence of a *mutuum* or of a proper stipulation, though this presumption could be rebutted

by the person who had given the written promise; for, if sued, he was allowed to show that no stipulation had in fact been made. As time went on, however, it seems to have become customary for debtors to give such *cautiones* without any suggestion of a preceding stipulation; this usage arose from the practice of committing stipulations to writing, and partly perhaps in imitation of the Greek *syngraphae* and *chirographa*. Suppose *A* has made a *cautio* in favour of *B*, acknowledging indebtedness for a certain sum, then either there was a loan of which the *cautio* is merely evidence, or *A* may have been fraudulently induced to make the *cautio* in prospect of such a loan, which in fact was never made. Now if *B* sues *A*, and there was in fact a loan, the action lies on the *mutuum* or, it may be, on the promise by stipulation given to repay the loan, the *cautio* in both cases supplying the necessary evidence and not being a literal contract. But if there had been in fact no loan, the *cautio* raises the presumption that there has been one, and *B* will be entitled to succeed if *A* is not in a position to rebut the presumption. Aquilius Gallus had enabled *A* to plead the *exceptio doli*; but this threw on *A* the burden of proving that the money had not in fact been paid over, a burden which very probably he could not discharge. So about the close of the second century A.D., *A* was allowed to plead in defence the *exceptio* (or *querela*) *non numeratae pecuniae*, which threw on *B* the burden of proving that the money had in fact been advanced. This defence could only be pleaded within a certain time, which under Justinian was fixed at two years. An artful creditor would naturally wait until this time limit had expired before he brought his action. He could then be met only by the *exceptio doli*, and *A* might fail to discharge the necessary burden of proof. However, in post-classical times and perhaps earlier, the debtor was allowed a *condictio* to recover the *cautio* before the time limit was up, and presumably the creditor had still to prove the validity of the *cautio* in that action. Justinian allowed the debtor to make the *exceptio non numeratae pecuniae* perpetual by notice to the creditor or to certain officials before the two years had expired. If he failed to do so, then after the period of protection had elapsed not even the *exceptio doli* was now allowed him, so that there was now an irrebuttable presumption against him. Justinian was, of course, only concerned to make this

evidential rule into a legal obligation so that he could maintain the fourfold classification of Gaius. Yet it can be argued that right was really on his side. Irrebuttable presumptions are couched as rules of evidence, but really it is mockery to call them such: they are in fact rules of law. So in cases where there had in fact been no payment by the creditor the *cautio* was the source of the obligation in the time of Justinian.

(D) Contracts made *Consensu*

These were obligations which arose as soon as the parties agreed to certain set types of transaction, and solely by virtue of that agreement. Whereas all other contracts, from the later Republic onwards, also required *consensus* for their validity, they all required some additional factor to create an obligation. In the consensual contracts all that was necessary was that the barest basic requisites for the particular transactions had been definitely decided upon — *e.g.* the *res* and the price in sale.

Four contracts were recognised by the classical jurists and by Justinian as warranting this dispensing with any further vestitive facts. They seem all primarily commercial in nature, but their origin is obscure. They may well have entered the civil law from the jurisdiction of the peregrine praetor, and they seem most likely to have been assimilated after the formulary system had become regular in the urban jurisdiction. This is especially true of sale and hire, but partnership and mandate have a certain domestic, as well as commercial, character and they may have developed separately from civil law origins. The key to the whole problem lies no doubt in the unsolved problem of the origin of the *bonae fidei iudicium*. Certainly all four had such *iudicia* at the end of the Republic. It is conceivable that they began with *actiones in factum* and later achieved their *formula in ius* like *depositum*, but there is really no evidence either for or against such a view.

The contracts were all bilateral, mandate, however, only imperfectly so. They were *iure gentium*, open to all regardless of *commercium*. Besides being *bonae fidei* instead of *stricti iuris*, they had the advantage over *stipulatio* (which was often used in their stead) that they could be made *inter absentes*. The four were named as follows: 1. Sale — *emptio venditio*; 2.

Hire — *locatio conductio*; 3. Partnership — *societas*; 4. *Mandatum*. The names are interesting: in *societas* all the obligations of the parties towards each other are the same; in *mandatum* the principal obligation is on one side (as in the real contracts); in the other two each side owes a distinct obligation to the other, corresponding but very different. These two contracts are the only ones in Roman law which are cited in the double form. English lawyers will refer solely to a sale, less frequently to a purchase, and will rest content that the one term necessarily involves the other, but the Romans, for the reason probably of the differently named remedies, always tended to cite the contract as the two obligations.

1. *Emptio venditio*

The emergence of sale is the sign of a developing society. In a primitive community any passing of property that may be allowed will normally pass by barter: *X* wants commodity 'A', which *Y* has, and *Y* wants commodity 'B', which *X* has, so they exchange, any marked discrepancy in their generally estimated value being most simply eliminated by the giver of the less adding some other article or articles. Sale emerges when people are no longer satisfied with having to wait till the person who has the commodity they desire happens to want something of their own. Much energy must be spent at such a stage in inducing the relatively uninterested holder of the article into parting with it. So the practice evolves of selecting some ready medium of exchange — some article or commodity which one may not need for its own use, but which others will later be prepared to accept in exchange either for its own use or for another exchange. The first such medium is often cattle, their usefulness being a safeguard against being unable to make an exchange for a considerable time. In Rome there is a little evidence of such an original medium; thus '*pecunia*', the word for 'money', may well be derived from '*pecus*', 'cattle'. However, in historical times it is known that bronze (*aes*) was the settled medium before coinage was introduced. Sales and other contracts would be effected with the weighed-out bronze (*per aes et libram*), but for *res nec mancipi* exchanges might still be frequent and sales might very often not involve a meticulous weighing. The introduction of coinage into Rome probably did not occur until

289 B.C., but thereafter there would be a ready and easily calculable medium of exchange.

Now up till this time all sales had legal effect only as and when executed, at least by one side. The normal transaction would involve the simultaneous delivery of the *res* and payment of the price: if either were left unperformed, probably some strict obligation (e.g. *stipulatio* or *nexum*) would be created to secure performance. Sale then was a conveyance with the contract just a part of it. Such was *mancipatio*. However, as has been seen, the Romans did quite early distinguish conveyance and contract and allow the two to be effected separately; and thereafter they never allowed the distinction to become blurred.

Most domestic contracts for sale could have been made by *stipulatio* or they were, in the vast majority of cases, contemporaneous sale and delivery. It would be the sudden growth of trade around the time of the inauguration of peregrine praetorship that for the first time presented the need for a formless enforceable agreement, particularly for sales conducted at a distance by messenger. One may, therefore, reasonably guess that the consensual contract of sale emerged sometime between 250 and 100 B.C., perhaps nearer the first than the second date.

One great distinction between Roman and English terminology must be noted at the outset. For us 'sale' is a term expressing a joint contract and conveyance: this is due to a rule of the fifteenth-century law of debt allowing that remedy to lie for the purchase price on a count for 'goods bargained and sold' as well as 'goods sold and delivered' (detinue lying correspondingly for the purchaser for the goods in question). This led to the doctrine that where the contract is to sell a definite specific chattel unconditionally the property in the chattel passes merely on agreement unless there is contrary intent. (The position is different and more complex in respect of land, where other historical considerations prevail.) In Roman law the rule was very different: sale created an obligation to transfer the *res*, but the actual transference had to be by a recognised form of conveyance.

Emptio venditio arose then when a vendor agreed to sell (*vendere*), a purchaser to buy (*emere*), some object of property (*res* or *merx*) for a definite or ascertainable price (*pretium*), and

the contract was complete at the moment the price was fixed (*certum*), regardless of whether the *res* had been handed over, the price paid, or anything given as earnest. There was no contract if the price was not fixed; there could be no sale for 'a reasonable price' and no such contract was ever implied; the sale could not depend on a future price-fixing event, however independent, such as 'next month's market price'. The price could, however, be referred to some past event (*e.g.* 'the last price the *res* fetched in the market') or to some present criterion (*e.g.* 'at the price Titius is charging in his shop this morning'), even though neither were immediately ascertainable. One arrangement gave rise to much controversy. If the price was to be fixed by a third party, Labeo and Cassius thought there was no sale, Ofilius and Proculus thought there was. Justinian decided that if the person in fact fixed the price, the contract was valid; if he failed to do so, it was void. The convenience of the rule is obvious, but it is difficult to reconcile with the rule about future prices. Perhaps the fact that the third party had a present ability to fix the price assimilated his judgment to the present criterion which required future ascertainment, and thus the case came within the rule, '*id certum est quod certum reddi potest*' ('what can be ascertained is certain'). But this is really specious: it is a case of '*reddi poterit*' ('will be able to be ascertained') not '*reddi potest*'. English law is much more liberal: it allows not only this case, but even fixing by one of the parties themselves, and always implies a reasonable price if the method of fixing fails and there is no contrary intent.

Formerly also, it was doubted whether the price need necessarily consist of a sum of money (*pecunia numerata*). The Sabinians thought that the price might be a slave, a piece of land, or a toga, while the Proculians pointed out that if the price were anything save money the contract was really exchange and that the contract of exchange was one thing, *emptio venditio* another. In the end, the opinion of the Proculians prevailed. The practical point was that it was necessary to distinguish between the buyer and the seller, since their obligations and actions were different. This requirement was satisfied if the price was partly in money, or, if originally fixed in money, something else was later agreed to be taken instead. These latter rules would apparently allow an exchange (*per-*

mutatio) to be dressed up as sale: e.g. *res* 'X' for *res* 'Y' plus one *sestertius*. The effect of an agreement allowing an option for price of either money or a *res* is even more uncertain. Logically, if the only criterion is the distinguishing of the *emptor*, then the line between sale and exchange appears a most capricious one. Caelius Sabinus went so far in trying to salvage the Sabinian position as to hold that it could be a sale where one party offered for sale and then the other counter-offered a *res*. An imperial enactment of A.D. 238 may have made him the concession of allowing an *actio ad exemplum ex empto*, but it seems more likely that even this halfway house was not really accepted and that the transaction was later treated as *permutatio*. The contract of exchange had a very different history from sale (*post*, p. 378), whereas in English law and most modern systems exchange and sale are treated almost entirely alike.

In the absence of fraud the courts would not inquire whether the price was adequate (*iustum*), but it had, however, to be real (*verum*), otherwise it was a *donatio* and subject, e.g., to the *lex Cincia*. Diocletian is credited with having provided, in the case of land, that if the price represented less than half the real value of the thing sold (*laesio enormis*) the vendor might rescind the contract unless the purchaser agreed to pay an additional sum so as to make the price a fair one. The rule is probably due to Justinian, as there is no trace of it before his time.

It was often the custom, on entering into the contract, to pay something by way of earnest (*arra*) but this was not an essential part of the contract. In early law, before the consensual contract, *arra* may have been a substantial deposit, acting as a penalty if the buyer did not complete and as part payment if he did. In classical law, however, it seems normally to have been small in value, consisting often of a *res* other than money (e.g. a ring) and thus only evidence that the contract had in fact been made. In Greek and Oriental practice, however, the *arra* was usually much more substantial and by way of penalty, and this seems to be the common situation in Byzantine law.

Justinian made certain changes in the law as to the formation of the contract. It would appear that in his time it was usual for some contracts of sale to be in writing, probably to

avoid disputes, while others were made without written evidence. Justinian provided that where the sale was agreed to be put in writing the sale was not to be binding unless that written contract had been drawn up and written, or at least signed, by the contracting parties, or, if drawn up by a notary (*tabellio*), fully completed and executed. Failing this, there was a *locus poenitentiae*, and either party might retract without loss, so long as nothing had been given in earnest. However, if earnest had been given, then, whether the contract was to be in writing or not, the purchaser who refused to complete forfeited his *arra*, while if it was the vendor who refused he was bound to restore it and pay the same amount in addition. If, of course, the sale was not to be put in writing and so was complete, each party, though thus punished, had also to answer for breach of contract in the ordinary manner.

Though the contract was complete when the price was fixed (or, in Justinian's time, if the contract was to be in writing when the writing was complete) and so gave each party rights *in personam* against the other, the property did not pass, *i.e.* the purchaser did not acquire the ownership of the thing sold (and so rights *in rem*) until delivery (*traditio*), and the vendor was not bound to deliver the thing until he had been paid the purchase-money in full. Under Justinian even delivery did not operate to pass the property until payment of the price, unless some real or personal security had been given. Justinian ascribes the rule to the Twelve Tables, and, if that is correct, it seems much more probable that it referred to *mancipatio* than to *traditio*, and it is quite likely the rule had long been obsolete before Justinian revived it and applied it to *traditio*. The whole topic is further muddled by another exception to the rule if the vendor '*fidem emptoris secutus fuerit*', which is not at all easy to translate. If it means 'gives the buyer credit', then there hardly seems much scope for the rule itself. However, *fides* here may mean something more (*e.g.* a formal promise to pay by stipulation), or it may be that an express agreement is necessary for such credit. The main result of the rule would seem to be to keep the seller's right *in rem* in being in case of the buyer's insolvency.

If, in the interval between the completed agreement and delivery, the thing perished without fault on the part of the vendor, the loss fell on the purchaser (who had still to pay the

price), contrary to the ordinary rule *res perit domino*. And in the same way, if the property unexpectedly increased or decreased in value, the purchaser gained or lost, as the case might be.

All property (*res corporales* or *incorporales*) could be the object of a contract of sale except —

(i) *Res extra commercium*. Here the contract was void. But if a man bought a freeman in ignorance, the vendor could be compelled by the *actio empti* to pay the purchaser the value of his bargain. The *actio empti* is odd because there is really no *emptio*, but it seems to be classical. In other cases (*e.g.* sale of a *res religiosa*) an *actio in factum* seems to have lain, and this is more logical because the obligation does not really arise *ex contractu*. However, post-classically the convenience of granting an *actio empti* triumphed over strict logic. (In English law an action lies on the breach of implied warranty of capacity : *e.g.* breach of promise where the promisor is already married.)

(ii) Things which both parties knew to be stolen.

(iii) Things already belonging absolutely to the purchaser.

(iv) Things the alienation of which was forbidden, *e.g.* land forming part of the *dos* ; or forbidden to the particular purchaser, *e.g.* a guardian could not purchase the property of his ward.

The prohibition did not extend to the sale of a third person's property, at least if one or both of the parties were in ignorance. As will be seen, however, such a sale came to be subject to important legal rules.

A sale of a *res*, which had in fact perished or lost its identity (*e.g.* a dead slave and perhaps things changed by *accessio* or *specificatio*) before the agreement, was void.

There could be a sale from the vendor's stock (*e.g.* 'ten of my cattle' or 'five bushels of the wheat in my barn') and also of something made out of the vendor's own materials. There were disputes as to the latter case, Cassius holding that there it was hire of the labour and sale of the materials. However, it was settled that the case should be one of sale only, whilst the contract would be hire if the materials (or the bulk of them) were supplied by the party paying. The rule seems clear and sensible, but it has its difficulties : a painter, commissioned to paint a portrait, would have his remedies in sale, not hire (unlike the English law — *Robinson v. Graves*, [1935]

1 K.B. 579); and the fact that where a builder is engaged to erect a house the contract will be hire, not sale, has to be explained by the subtleties of *accessio* or by the land's being part of the materials.

There is no clear case of a sale of generic goods, except from a specified mass. It is inconceivable that such transactions were not frequent, leaving the vendor to find the goods from what source he chose. As the goods could obviously not be inspected in such a case there would have to have been an adequate description and the use of stipulations would seem to be admirably suited for such a purpose. However, the fact that stipulations could not be used at a distance (*e.g.* by letter) makes it amazing that there is no text clearly dealing with the problem. The answer may lie in the Roman methods of bulk-buying and of using slave agents to make stipulations, but at present it is impossible to say whether *emptio venditio* could ever be used for purely generic goods.

It was possible to sell things which had merely a potential existence, *e.g.* next season's wool or fruit crop (*emptio rei speratae*) provided it materialised, and even the mere expectation of property, whether it materialised or not, *e.g.* whatever the next cast of the net might bring up (*emptio spei*); but the line between the two is difficult to draw. Perhaps the best test is the motive of the parties: in the former case there is a clear business deal, the vendor getting a guaranteed market, the purchaser a secure source; the second case is nearer a wager and could be an insurance for the seller. The sale of an existing *hereditas* (but not one of a still living person) was good and so was that of any other *res incorporalis* such as a usufruct, but not *usus*, though it was possible to purchase the creation of both of these.

A sale might be made subject to a condition, but risk (*periculum*), at least of destruction of the *res*, remained with the vendor until a suspensive condition was fulfilled; it is not certain who bore the risk of deterioration and got the accretions — perhaps the purchaser if he ultimately acquired the *res*. A resolute condition (one rescinding a contract already in existence, whereas the suspensive one delayed the contract's coming into operation) did not prevent the purchaser coming under risk, but in each case it was open to the parties to make their own terms as to risk. In the absence of agreement neither

party could unilaterally rescind even a conditional contract, and the heirs took, and were bound by, such contracts.

It was open to the parties to attach any agreements (*pacta adiecta* or *leges*) to their contract at the time they made that contract, and these agreements were enforceable by the *actiones empti* and *venditi* by virtue of the *ex fide bona* clause. Pacts added later (*ex intervallo*) were, however, ineffective except in defence.

Various *pacta* were common in sale. Some resembled our sales on approval, and of these there were two varieties. (a) The purchaser bargained for a preliminary trial — in the case of such consumables as wine, *emptio ad gustum*, in the case of unconsumables, *pactum displicentiae*, e.g. a horse on trial; ownership and risk did not pass till approval was signified. (b) More commonly in *pacta displicentiae*, the purchase was immediate, but the purchaser reserved the right to rescind the sale if the trial was not satisfactory; here ownership and risk passed at once, but accidental destruction or loss does not seem to have affected the purchaser's right to rescind. The vendor might bargain for the right in certain circumstances to buy the thing back (*de retrovendendo*), or the purchaser the right to sell it back to the vendor (*de retroemendo*) at the original or some agreed price. By a *lex commissoria* the vendor could avoid the sale if the price were not paid by an agreed time; he could also reserve a right to sell the *res* for a higher price if another customer appeared before a certain date (*in diem addictio*); and he could provide himself with a right of pre-emption if the buyer wished later to sell (*pactum protimeseos*). In short, the parties could, with certain exceptions, make their own bargain, since the contract rested on agreement alone.

The chief duties of the vendor, apart from any special agreement, were —

(i) Until *traditio* to show the care of a *bonus paterfamilias* in the custody of the thing. As the risk was with the purchaser, the vendor was not liable for accidental loss, but he had to assign to the purchaser any rights of action he might have against third parties for loss or damage due to no default of his own. In classical times he may have been liable for *custodia* as well as for *culpa levis in abstracto*. This would have meant that the buyer risked natural causes (e.g. death of a slave by disease) and *vis maior* (e.g. earthquake) alone, the

vendor being liable for acts of third parties even if he were not negligent.

(ii) To make delivery on payment, together with all accessions and fruits. But this obligation was limited to *tradere*, it was not *rem dare*, and therefore the vendor was not bound to make the purchaser owner or *dominus*, nor could the purchaser rescind merely because it turned out that the vendor was not owner, and so unable to pass *dominium* to him. Presumably, whilst *mancipatio* existed, the buyer could insist on a formal conveyance of a *res Mancipi*. The absence of a duty to make the buyer owner is best explained by the difficulty of fully proving *dominium* and the comparative speed of *usucapio*.

(iii) But the vendor was bound, besides making *traditio*, to guarantee to the purchaser the undisturbed possession of the thing. Originally in a *mancipatio* there was, under the Twelve Tables, an *actio auctoritatis* for double the price if the vendor failed, within the period of a usucapion, to defend the purchaser successfully against anyone claiming by a superior title. In the case of a sale of a *res nec Mancipi* of value it was usual to stipulate for the same protection (*stipulatio duplae*), but where the value was small a *stipulatio habere licere* for the actual loss suffered was given instead. Actual eviction under a judgment was needed before a claim could succeed in the former case, but in the latter it normally sufficed if the vendor had a bad title. Later the purchaser could insist on such protection by bringing an *actio empti*, and then, still in the classical period, one or other of these stipulations came to be implied according to the value of the *res* and the custom of the market or locality and whether the *res* were *Mancipi* or not. This evolution was almost certainly helped by the *bonae fidei* nature of the *actio empti*, and in the last stage it was normal to sue on that action rather than on the stipulation, at least in respect of the *habere licere* obligation. Thus in the end the buyer became entitled to an indemnity for loss of his purchase through a defect in title.

(iv) At civil law the vendor, in the absence of *dolus* or express words of description or warranties, was not liable for defects in the quality of the thing sold. But the *curule aediles* introduced two new actions, by means of which certain warranties were implied, first where slaves, and later where horses or cattle, were sold in open market (over which, of course, the

aediles had control); both sets of warranties were against physical defects (*e.g.* disease) and those on slaves also against character defects (*e.g.* tendency to run away); and, subsequently, these remedies were, by the interpretation of the jurists, extended to all sales and all defects. The actions in question only applied to latent defects, not patent. They were —

- (a) The *actio redhibitoria*, and
- (b) The *actio quanto minoris* (or *aestimatoria*).

The former action enabled the purchaser who had been deceived by some serious latent defect in the thing sold to rescind the contract and recover his purchase-money with interest; but the action had to be brought within six months from the date of the contract. Alternatively, the purchaser might by the other action (*quanto minoris*) recover damages only, where the defect was not vital, and this action could be brought within one year. As with warranties against eviction, the vendor's implied liability could be excluded by agreement. Closely analogous to liability for defects were two ancient liabilities upon a *mancipatio* of land: (a) if the vendor described the land as '*optimus maximus*' (best possible) and there was an undisclosed servitude against it, he was liable on the *actio auctoritatis*; (b) if he overstated the acreage, he was liable on an *actio de modo agri* for double the proportionate price of the missing area.

The chief duties of the purchaser, apart from any special agreement, were —

- (i) To pay the price, together with any necessary expenses incurred.
- (ii) On default of punctual payment (the contract being *bonae fidei*) to pay interest.
- (iii) To collect the *res* when the time agreed upon occurred, or otherwise when the seller called upon him to do so. Failure to do so put him in *mora* and the vendor then became liable only for *dolus* and *culpa lata* in keeping the *res*.

The vendor's action was the *actio venditi* (or *ex vendito*).

2. *Locatio conductio*

The contract of letting and hire had three forms: (a) *locatio conductio rei*, (b) *locatio conductio operarum*, (c) *locatio conductio operis*.

(i) *Locatio conductio rei* was where one party to the contract (*locator*) agreed to let the other party (*conductor*) the use of a thing for a money payment. The contract (as in the two other forms) was complete when the *merces* (the amount of the hire) was fixed. It had to be in money, except in the case of land, where it could be in produce; and therefore if *A* lent *B* his ox for ten days, in return for a loan by *B* to *A* of *B*'s horse for a like period, it was not a case of *locatio conductio*, but an innominate contract, similar to *permutatio*. If the thing let was a house, the *conductor* was called *inquilinus*, if a farm, *colonus*. It was from these *coloni* that there developed in the Empire the class of *coloni adscripti glebae*, who were virtually serfs. The latter class grew enormously in the Byzantine period, but there still remained some 'free' *coloni*. Land could be let very much as in English law — for set terms (five years was frequent in agricultural land) or periodically, and there could be subletting. *Merces* was more often rent than a lump sum.

Hire of this sort (of a *res corporalis*) presented close resemblances to sale. Hence difficulties seem to have arisen as to which of the two contracts were made in the following cases — (a) *A* lets to *B* a band of slaves as gladiators; *B* is to pay twenty *denarii* for each uninjured slave, and one thousand for each killed or disabled. Gaius says it was disputed whether the contract was sale or hire, but that the better opinion was that it was *locatio conductio* in relation to the slaves uninjured, but *emptio venditio* as regards those killed or disabled. The transaction could therefore be regarded as a conditional sale or hire of each slave. (b) *Emphyteusis*, or leases of land in perpetuity at a rent, raised a similar doubt, but Zeno decided that they constituted a juristic transaction distinct from either sale or hire. (c) If a goldsmith was employed to make a ring out of his own gold, Cassius thought it was a case of *emptio venditio* of the gold and a *locatio conductio* of the goldsmith's services, but the opinion favoured by Gaius, that it was but a single transaction of sale, gained acceptance (*ante*, p. 357).

With regard to risk, there was a difference from the law of sale. The risk of loss remained with the *locator rei*, and therefore, if by accident the thing let was destroyed before the hirer got it or if, while in his possession, and without his fault, it became useless, the hirer was released.

The *locator* was bound to deliver *detentio* of the thing let and maintain the hirer in enjoyment of it. It must be fit for the purpose for which it was let, and maintained in that condition by him. He must pay for necessary expenses incurred in the preservation of the thing. The *conductor* had to accept *detentio* and show the care of a *bonus paterfamilias* in its use, paying the agreed *merces*, not using it for purposes not agreed upon, not altering its character, and restoring it at the end of the hiring in substantially the same condition as that in which it was received. The rights of the *colonus* in *fructus* have been considered in the law of property (*ante*, p. 188).

(ii) *Locatio conductio operarum* was where one party (*locator*) let out his services to the other (*conductor*) in return for a money payment. The services so let could only be *operae illiberales*, and therefore advocates and physicians, surveyors, professors of law, and other skilled professional men could not conclude this contract. These men came to be able to claim an *honorarium* under the *cognitio extraordinaria* in the late Empire, but theoretically they acted gratuitously and the contract was *mandatum*. Perhaps the general notion of indignity of work in the upper classes prevented such men from entering into stipulations in respect of their services. *Locatio operarum* probably began as *locatio servi* (i.e. *rei*) and was then developed for the benefit of freedmen.

(iii) *Locatio conductio operis (faciendi)* was where one party (*conductor*) agreed to make something out of, or to do a job in relation to, materials belonging to the other (*locator*) for a money payment, e.g. *A* agrees to build *B* a ship with *B*'s wood. As in the other cases, the price must be fixed, so if *A* agrees to clean or mend *B*'s garments and no definite price is fixed at the time, the implied reasonable price will not make the contract one of *locatio conductio*. It is an innominate contract and can be enforced *praescriptis verbis* by *A* only if he has done the work.

In all three cases of *locatio conductio* each party was bound to show the care of a *bonus paterfamilias*. Though in the case of *locatio rei* death did not terminate the contract, in the other cases it might, e.g. if the contract were for personal services.

The threefold classification was not made by the Romans: the terminology of each case would usually make it clear what was involved. The fact that the payee was the *locator* in cases

(i) and (ii) but the *conductor* in (iii) is more confusing to us than it would be normally be to them. Translation is difficult — *locare* involves a physical or metaphorical placing of which the *conductor* is recipient. (As it is, our own words 'hirer' and 'to hire' are acutely ambiguous.) The remedies were the *actio locati* for the *locator* in each case, and the *actio conducti* for the *conductor*.

3. *Societas*

Societas was a contract by which two or more persons agreed to make a contribution of capital, labour or the like, for some joint enterprise, usually, but not necessarily, commercial exploitation, e.g. to carry on a tavern. The contract was *iure gentium* so that peregrines apparently could be *socii* with *cives*. However, there existed in early law a *iure civili* form of *societas* called *consortium* or *ercto non cito*. It arose where *sui heredes* agreed not to divide up the *hereditas* from their former *paterfamilias*, but to run it jointly; and there was a means, by use of a *legis actio*, of achieving this *consortium* independently of *hereditas* (details are unknown, but it must have been a fiction based on the former case). *Consortium* seems to be the origin of the *societas omnium bonorum*, even though rules such as that the act of one *consors* was a valid manumission or *mancipatio* against the rest did not survive. It probably influenced all forms of partnership that developed later as consensual contracts (e.g. the rule as to *infamia*).

The consensual contract might take one of four main forms —

- (i) *Omnium bonorum*.
- (ii) *Omnium bonorum quae ex quaestu veniunt*.
- (iii) *Alicuius negotiationis*.
- (iv) *Unius rei*.

(i) A *societas omnium bonorum* was a partnership which excluded the idea of any partner's possessing private property; for the agreement was that all property of the partners which they had previously owned in separate ownership, or which they might acquire during the partnership, was to become the common property of all. This is one of the rare cases in which *dominium* passed by *nuda voluntas*; i.e. by the partnership agreement, except, of course, as to after-acquired property. Debts due from one partner only could be recovered by the

creditor out of the partnership property, but damages occasioned by a partner's delict or wrong only so far as the partnership had been enriched thereby.

(ii) *Societas omnium bonorum quae ex quaestu veniunt* was the form of commercial partnership which was presumed in the absence of other evidence, the partnership property being limited to property acquired by the partners in business transactions. Each partner might, therefore, have private property (e.g. property which he acquired as *heres*) and private liabilities (e.g. household expenses).

(iii) A *societas alicuius negotiationis*, the most common form, was where the partnership was limited to gain in some particular business, e.g. slave-merchants, and a species of this form of partnership was *societas vectigalis*; i.e. a partnership for farming taxes, which had the peculiarity that it was not dissolved by the death of one of the partners.

(iv) A *societas unius rei* was one which had as its object some single transaction, e.g. the acquisition of ownership of land to prevent its commercial exploitation by others.

In each case a partner was bound to make some contribution to the common purpose, whether of capital, skill or labour. The share of each partner in the partnership property and in gain and loss was presumed to be equal. But this might be varied by agreement. One partner might, e.g., agree to contribute all the capital, though the profits were to be equal, 'for a man's skill or labour is often equivalent to money'; and a partner might even, by special agreement, share the profits but not be liable for loss; but the converse case, i.e. where one partner shared loss but was wholly excluded from gain, amounted to a *leonina societas*, and the partnership was void. Each partner was bound to show good faith towards the others; originally he was liable only for *dolus* (hence the liability for *infamia*), but under Justinian he had to show *diligentia quam suis rebus*. It is uncertain whether in classical law he was still liable for *dolus* only or had to show *diligentia boni patrisfamilias*. Each was entitled to share in the administration, but could not admit others to this without liability for any resulting loss. But the conduct of the business could be entrusted by all to a manager, who need not be a *socius*. A partner called upon by creditors of the firm (for the firm had not a distinct legal personality of its own) to pay more than

his fair share had a right of contribution against the rest, and was bound himself to bring into the common fund whatever he acquired as a partner. The action by which a partner enforced his rights was the *actio pro socio*, and a partner who defended and was condemned in this action might incur *infamia*; while at the end of the partnership the *actio communi dividundo* might also be available to enforce the proper division of the partnership property.

The contract of *societas* is remarkable in that the legal consequences were almost entirely concerned with the internal relations of the partnership. The rights and liabilities with regard to third persons were left to the general law and to the contract of *mandatum* where it existed. If all the partners entered into the contract, all could sue and be sued on it. If, on the other hand, one partner made a contract in his individual and private capacity, he alone could be sued. A more difficult case was where one partner made a contract on behalf of the firm. The firm, having no distinct legal identity, could not sue on such a contract; nevertheless, it could secure the benefit, for the partner who had entered into the contract could be compelled to cede his right of action to his partners. Conversely, the firm, as such, could not be made liable, but eventually the other partners might be sued as individuals on an *actio utilis* if the contracting partner was their *mandatarius* (agent), and also in certain special forms of the contract. If no such actions lay the creditor had to sue the individual personally, which might involve a breaking up of the *societas* if the debtor had not sufficient separate assets.

Ulpian tells us that a partnership might be dissolved *ex personis, ex rebus, ex voluntate, ex actione*.

(i) It was dissolved *ex personis* (a) when one partner died (unless the *societas* was *vectigalis*), and even if two or more were left the partnership was determined between them, as well as in relation to the deceased partner, even if the partnership articles otherwise provided (in this case there would be a new *societas*). (b) *Capitis deminutio* had the same effect as death, save that under Justinian only *maxima* or *media* so operated. (c) Where one partner forfeited his property to the *Fiscus*, or on bankruptcy made a *cessio bonorum*, or was sold up in bankruptcy. In all cases the remaining *socii* could form a new *societas*.

(ii) *Ex rebus*, when the purpose for which it had been formed had been accomplished or become impossible; where the term fixed for the partnership had expired, or where, the *societas* being *unius rei*, the thing in question had ceased to exist (e.g. a horse).

(iii) *Ex voluntate*. A partner could retire by mutual agreement, or against the will of the other partners by renouncing, even though a term was fixed for the continuance of the partnership and had not expired, or in spite of an agreement not to renounce. But the retiring party had to compensate the others for a withdrawal which unfairly prejudiced their interests, and if the partner retired from some secret motive, e.g. to secure for himself a prospective gain, his *callida renuntiatio* did not avail him, for he was obliged to share the profit, when it accrued, with his partners. For example, *A*, who is a partner in a *societas omnium bonorum*, hears that he is about to become *heres* to *B*, a rich man who is dying. *A* at once retires, and after the partnership has been so determined *B* dies and *A* becomes heir. *A* is bound to share the advantages with his former partners.

(iv) *Ex actione*. A *societas* might be dissolved by an *actio pro socio*, except where that was brought for minor adjustments. Condemnation involved *infamia*, but perhaps only in the case of *dolus*. On the other hand, condemnation was only to the limits of the defendant's assets (*beneficium competentiae*). The action *communi dividundo* lay for a division of the common property and the rights and liabilities connected therewith.

The special form of *societas* known as *vectigalis* had for its object the purchase from the State of tax-farming, a right sold by public auction and generally for five years. There might be contributors who were not *socii* called *participes*. Death did not end the contract as a rule. By agreement the *heres* of a deceased partner could take his place, and this did not make it a new partnership. It may have been a type of corporation, the rights and duties attaching to the whole and not to the individual partners.

4. *Mandatum*

A mandate was a contract by which one person (designated by scholars as *mandatarius*) gratuitously undertook to do some service at the request of another (*mandator*). The service had

to be a future one and could not have an unlawful or immoral object. If the service was to be paid for, and the amount fixed, the case was one of *locatio conductio*; if the reward were not fixed the transaction might amount to an innominate contract. Though it was gratuitous in form, there might in later law be an agreement for an *honorarium* enforceable *extra ordinem*. A *mandatum* required no special form and might be made conditionally, or to take effect from some future time. The contract was formed when the *mandatarius* (agent, to use the term very loosely) undertook the business (he was, of course, free to refuse), and from that moment the *mandator* had the *actio mandati directa*, the agent the *actio mandati contraria*. Although the contract was complete on agreement, so long as nothing had been done in pursuance of the mandate either party could determine the contract. If, however, it was the agent who renounced, he was bound to do so as soon as possible, so as to enable the *mandator* to get the business carried through in some other way, and if the renunciation was too late for this to be possible the *mandator* had his *actio mandati* against the agent unless the agent had some good legal excuse (e.g. the *mandator* had become bankrupt or the agent was suddenly overtaken by a serious illness). Where the *mandator* revoked, the *mandatarius* kept his powers until he had notice, and third parties were also protected till notice. The *mandatarius* could, of course, recover all expenses incurred before he received the notice.

Since the *mandator* could revoke before the *mandatarius* had proceeded to act and the latter could renounce before he had entered on his commission (provided this did not prejudice the *mandator*) whereas he could not do so once he had begun it, it has been suggested that mandate is more like a real than a consensual contract, or at any rate stands halfway between the two classes of contracts. This is not so, for it does not in the least resemble a real contract where delivery of a *res* constituted the *causa obligationis*. Neither is it predominantly like the innominate contracts, where action does not lie till one party has performed his part and so put the other under a legal duty to perform his, for in mandate the agreement itself binds, and, though such an agreement is within the limits noted revocable, in the absence of such revocation or renunciation there is no doubt that the agreement binds.

Justinian states that a mandate might take one of five forms —

(i) *Mandatum sua* (or *mandantis*) *gratia*, for the benefit of the mandator alone; e.g. a request that the agent should conduct the *mandator's* business or buy an estate for him.

(ii) *Tua et sua*, for the benefit both of the agent and the *mandator*; e.g. a request that the agent should lend money at interest to a friend, who was the mere nominee of the *mandator*; the *mandator* benefits by the loan, the agent by getting interest on his money.

(iii) *Aliena*, for the benefit of a third person; e.g. where the request was to manage the affairs of Titius, a friend of the *mandator*.

(iv) *Sua et aliena*, for the benefit of the *mandator* and a third person; e.g. the *mandator* asked the agent to manage property belonging jointly to the *mandator* and Titius.

(v) *Tua et aliena*, for the benefit of the agent and a third party; e.g. where the request was to lend money to a third person.

A request for such a loan was called *mandatum credendae pecuniae* or *mandatum qualificatum* and was a form of suretyship, being usually associated in the Digest with *fideiussio* (*ante*, p. 344); for a man who requested another to lend money to a third person was held to promise repayment himself if the third person made default. But a contract of suretyship by *mandatum qualificatum*, though it closely resembled one formed by *fideiussio*, had certain minor distinctive features; e.g. the principal debtor and *fideiussor* being liable for the same debt, the *fideiussor* was until Justinian released if the creditor sued the debtor and the action reached *litis contestatio*, whereas the *mandator*, being liable on a separate contract, could be sued although the agent had first sued the third person, to whom he had lent money at the *mandator's* request; further, the *mandator*, even after paying the agent, could demand that the actions should be transferred to him, if still subsisting.

A *mandatum tua gratia*, i.e. merely for the benefit of the agent, created no obligation. If, therefore, one merely advised another to do something which concerned him alone, the contract of *mandatum* was not formed: it was a case of *consilium* (advice); e.g. *B* is doubtful whether to invest his money

in the funds or to buy land with it. *A* suggests the former course. *B* follows his advice and suffers loss. *B* cannot in classical law recover the loss in the absence of fraud; but Justinian seems to have granted an *actio contraria* if it appeared that *B* would not have acted as he did but for the advice.

The duties of the agent who had accepted a *mandatum* were as follows —

- (i) To execute it (unless he promptly disclaimed).
- (ii) To show *diligentia boni patrisfamilias* in the later law; in classical times he was probably liable only for *dolus* (and *culpa lata*), certainly so in early law. The *mandatarius* must not exceed his instructions. If, being instructed to buy at 100 *aurei*, the agent bought at 150, the Sabinians thought that he could not sue the *mandator* even for 100 *aurei*. The Proculians held that the action would lie for the lesser amount, and this opinion prevailed. The agent could, of course, buy for less than the sum authorised.
- (iii) To make over to the *mandator* anything he acquired in the execution of the mandate and also any actions relating to the transaction.
- (iv) To render a proper account.

These duties could be enforced by the *actio mandati directa*, condemnation in which carried *infamia*. The *mandator*, on the other hand, could be compelled by the *actio mandati contraria* to reimburse the agent and indemnify him against all expenses and liabilities properly incurred in the execution of the commission. The actions were *bonae fidei*, and the contract was imperfectly bilateral in the same way as deposit and *commodatum*.

The contract ended —

- (i) Where the object was accomplished or became impossible.
- (ii) By the mutual agreement of the parties, even in course of performance.
- (iii) By repudiation, as already seen.
- (iv) By the death of either party *before* the mandate had been executed; but — (a) if the agent executed the mandate after the death of the *mandator* and in ignorance of his death, he was allowed, nevertheless, *utilitatis causa*, to bring the *actio mandati contraria* against his principal's heirs; and if the agent died in course of performance his heir was bound

to complete the business ; (b) if the *mandatum* was for an act to be done after the principal's death, it probably remained good in spite of the death of the principal.

The chief applications of mandate.

(1) Agency. The contract of *mandatum* was the basis of the law concerning the relations between a principal and his agent. As such it was reasonably satisfactory : the rights and duties *inter se* arose whether the agreement was for a consideration or not ; there was a sensible law as to repudiation ; the interests of both sides were fully accommodated. If there were any forbidding features they would seem to be that the agent was liable to *infamia* and that under Justinian, at least, the principle of not prejudicing the principal's position had reached the stage that an agent was liable for negligence on what was theoretically, at least, a gratuitous contract ; even this latter feature may have been moderated by the standard's being *quam suis rebus*. So much for the internal nature of the institution.

As regards external relations and the rights and obligations of third parties the Roman picture, as with *societas*, is a much sorer one. In modern systems the law relating to agency has received a very complete development owing to the expanding needs of commercial intercourse, so that if an agent duly authorised by a principal with the necessary capacity, acts within the terms of his authority, he merely establishes direct contractual relations between his principal and the other party, but himself acquires no rights and incurs no liabilities if he makes it clear that he is acting merely as an agent. This was never so in Roman law.

Now as regards agency in contract it is important to repeat the distinction made in respect of representation in acquiring and alienating property : that between a *nuntius*, who is a mere intermediary with no power of negotiation and acting entirely on his principal's instructions, and the true agent or representative, who has a substantial discretion to form an agreement and its terms. Although the distinction is not always very clear in individual cases, it was vital in Roman law. The mere *nuntius*, whether his message was oral or written, could always be used for informal contracts and those contracts would exist purely between the principal and the receiver of the message — the *nuntius* being no party at all to

the contract. However, the personal nature of *obligatio*, stricter even than the Common Law privity of contract, was such that no representative (*nuntius* or real agent) could be used for formal acts, such as *stipulatio*, and that, where the representative was more than a *nuntius*, any contract that ensued created obligations solely between the agent and the third party, the principal having no interest or liability under the contract itself. Of course, a principal could, under a *mandatum*, get the benefit of the contract, and the agent recover all expenses and be indemnified against the principal. But if the principal were to become insolvent the agent would have to bear the brunt of liability under the contract, and all actions for and against lay in the agent's name.

Now this civil law position was in dire need of amendment as soon as Rome developed into a commercial nation. Amendment did come, mainly through praetorian intervention and juristic development therefrom, but even at the end the law was still far short of perfect representation. The basis for changes was twofold: firstly, a second *mandatum* was used to implement the original *mandatum* and give the *mandator* the right to sue the third party; secondly, and much more importantly for the concept of agency, actions were developed in favour of the third party directly against the principal, but here the basis was not *mandatum*, but rules made by the praetor in respect of agreements made by persons in *potestas*, these rules eventually affecting *mandatum*.

In the first case the means was the simple use of a second *mandatum* to have the principal (*mandator* on the first *mandatum*) made *procurator ad litem* (i.e. *mandatarius* under the second *mandatum*) so as to enable him to sue in the name of his own agent. This roundabout and unsatisfactory machinery remained the only general means of procedure for the principal. In exceptional circumstances, e.g. the agent's insolvency, the principal was given an *actio utilis* against the third party, who was then protected against any action from the agent by an *exceptio doli*, but the *actio utilis* was never generalised.

The development from the liability of the *paterfamilias* is very interesting. At civil law he was in no way liable on the contracts of those in his power, but he was entitled to benefit under them. Thus he could sue directly on any stipulation made by them and he could elect whether to sue on any bilateral

agreement, but if he did so he was liable on that agreement to the counterclaims of the other party by virtue of the *bonae fidei* character of the actions. The other party had, however, no rights against him until the *paterfamilias* sued. As against the *alieni iuris* the promisee had very little protection: against slaves, those in *mancipio* and *filiaefamiliarum* he had no rights at all (except for the *naturalis obligatio* of the slave and, perhaps, the others), and against *filiifamiliarum*, though there was a full civil obligation on them personally, he had no power of execution until they were *sui iuris*; and even then they had several privileges, such as the *beneficium competentiae* and the need for *causa cognita* (*ante*, p. 318). He could not even attack their *peculium castrense* and *quasi castrense* if the contract were on the father's account.

It was this terribly inadequate system that induced the praetor to give his actions, especially since intelligent slaves generally conducted a large part of business. The remedies are now known as the *actiones adiectitiae qualitatis*. They were all probably framed with a Rutilian *formula*, the principal being named in the *condemnatio* as liable for the obligation of the agent stated in the *intentio*; if the agent was a *filius*, the *formula* was quite in order because of his own civil liability; if he was a slave, the *intentio* would have to contain a fiction of freedom ('*si liber esset*') in order to meet the use of '*oportere*', which occurred in any *formula in ius concepta*. In each case the existence of the praetorian action did not affect the existence of any civil action against the agent (*e.g.* the *filius* or, in the last two actions, an independent agent); payment under one action would, of course, prevent success in the other. The praetorian actions were five in number —

(a) The *actio quod iussu* lay where the *dominus* or *paterfamilias* authorised (or, at least in later law, ratified) the agreement. The *iussu* may well have been a communication of authorisation to the other party, not the slave or *filius*, but it seems that under Justinian, at any rate, the action lay even though the plaintiff did not know at the time of contracting. Liability was for the full amount (*in solidum*). The authorisation applied only to transactions clearly specified by the *dominus* or *pater* — there was no question of general authority under this action, and the liability only existed so far as the *alieni iuris* kept to the terms of the *iussu*.

(b) The *actio de peculio et in rem verso*, really a combination of two actions, lay where the *dominus* furnished a *peculium* and the slave traded with it. The *dominus* (or *pater*) was liable up to the extent of the *peculium* as that stood at the time of judgment; but while he could deduct anything due to him and to others in the *familia* from the *peculium*, he was fully liable to the extent of any profit to his own estate. It is thus a case of limited liability, but the limit as to *peculium* was to the whole fund, not just the part traded with. It is even further from agency than some of the other cases, for the particular transaction that occasioned the loss may have been actually forbidden by the *dominus* or *pater*. The principle would seem to be that he who supplied the means and made possible their employment for gain should be liable up to the extent of those means and the profit therefrom.

(c) The *actio tributoria* lay where a son or slave traded with his *peculium* to the knowledge of the father or master, the liability being limited to the part of the *peculium* so employed, but without any right in the father or master to make any preliminary deductions of what was due to him. The creditors called on the *paterfamilias* to share out the part of the *peculium* concerned between them and himself, if anything was due to him, proportionately to their respective claims. If they suspected an unfair share-out, they brought the action.

The above cases are confined to persons in the *familia*. In two further cases the praetor extended the principle to persons not in the *familia*, but in each case the remedy was probably available against the *dominus* or *paterfamilias* before lying against the principal of an independent agent.

(d) The *actio institoria* lay where a son, a slave, whether one's own or another's, or a freeman was appointed *institor*, that is, to the management of a business, to recover all that was due on contracts entered into in connexion with it.

(e) The *actio exercitoria* lay where one person, called the *exercitor*, appointed another to the charge of a trading ship, for all contracts entered into by such *magister navis* in connexion with the adventure.

These last two, like *quod iussu*, were *in solidum*, and so a creditor would always sue upon them if he could. If none of the three were open to him, but the promisor had been a slave

or *filius*, it would normally be more advantageous to sue out *de peculio et in rem verso*, the whole *peculium* being available and the profit as well ; but if he were late in suing or suspected the *paterfamilias* might make severe deductions from the principal, it would be better to proceed towards the general liquidation of the fund in question, with the sanction of the *tributoria* in the background.

It is possible that even before the end of the classical period the last great development occurred in this field. Papinian is quoted as allowing an *actio utilis ad exemplum institoriae* (later known as *quasi institoria* also) against a principal on the contract of an independent agent, even for a single transaction. It is more probable that this extension from the case of the general agent was post-classical, but whenever it occurred it meant that eventually the third party in nearly every case had a choice of action against either the agent or the principal.

The final picture under Justinian, therefore, was as follows : where *A* contracted for *P* with *T*, *P* could sue *T* only as *agent* of *A*, except in special cases ; but *T* could sue either *A* or *P*. This meant that *T* was much more secure than in English law ; whereas *A* always had to stand the chance of *P*'s insolvency's preventing a full recoupment on the liability to *T*.

(2) Suretyship. This application has been noted under *mandatum credendae pecuniae* or *mandatum qualificatum*.

(3) For the purpose of conducting litigation. No representation was generally possible under the earliest or *legis actio* system of procedure, but under the formulary system this was permitted, and a *procurator ad litem* could be appointed by mandate for the purpose, as we have seen already in respect of agency. Such an appointment was quite informal like any *mandatum* and has to be distinguished from the more formal representation by *cognitores*. The differences will be discussed under the law of actions.

(4) The transfer of obligations. This subject will be dealt with more fully later on ; here it suffices to say that the benefit of an obligation, but not the burden, could, in effect, be transferred by giving a mandate to sue for what was due, with an agreement that the transferee could keep what he recovered for himself. He was called a *procurator in rem suam*.

(E) Innominate Contracts

Gaius does not mention these obligations, nor do Justinian's Institutes. In the case of Gaius this can be explained by the fact that either there were no such *obligationes* yet or those that existed were too few and too specialised to be classified at all. By Justinian's time there was, however, a general principle that made the class important and far-reaching.

As has been seen, Roman law in the early Empire knew of only a limited number of contracts: four consensual and several real contracts had emerged, but otherwise all other transactions had virtually to be effected by *stipulatio* if they were to be legally binding. Whilst the Empire was still predominantly Roman in character and the *stipulatio* was still popular and respected, there would not have been much pressure for the recognition of new contracts. However, that does not mean to say that certain situations, essentially contractual in later imperial and in modern eyes, did not give cause for litigation and provision of some remedy. If *X* induced *Y* to hand over a horse or to perform some act in return for *X*'s promise to give a cow, then, if *Y* could show *X* had been fraudulent, it was a clear case for the *actio doli*. But proof of fraud is never easy, and in many cases there had been no fraud. Now the Roman lawyer could look upon such cases and feel the need for further help without his going to the length of recognising new contracts. A *condictio* (*ob rem dati* or *ob causam datorum*) was appropriate: wherever *X* had received any property (e.g. the horse) he could be sued by *Y* for its return (or its value). This, however, is nearer the quasi-contractual principle of unjustified enrichment than a true contract: one can recover what one has given, but if one was to receive something more valuable or useful in return or if one has suffered consequential loss from the breach of the bargain, one has no means for obtaining such compensation. Besides, the *condictio* lay only for physical *res* — there was no remedy, apart from fraud, if one had done another a service or performed a manumission or forbore to act.

Now there is the possibility that before the end of the classical period some contractual remedies had arisen in one or two cases. There may have been a number of praetorian

actiones in factum, but this is disputed. Either arising from such *actiones* or independent of them one or two *actiones in ius* may have been introduced. There is again much controversy. If, however, there were such actions it seems that they were developed only because they were exceptionally close to the consensual contracts, certainly not on any general principle. The most probable of such classical actions would be the *actio de aestimato*. *Aestimatum* was a common Roman method of business: the wholesaler handed over an object or objects to a retailer on a sale or return basis. There had been much dispute (as in the gladiators' case) as to which of the consensual contracts covered the transaction: it might be sale with pacts annexed, hire until sale, or even mandate or *societas*. To settle the disputes a particular remedy was made for it — even one with a *formula in ius*. Perhaps exchange in view of its similarities to sale also achieved similar treatment before the end of the period.

Whatever the position during the classical period there was a great advance in the later law. The *condictio* remained but had been greatly extended. Apparently it could be brought not only where a physical thing was involved, but also where a service had been performed, at least to the extent of the defendant's benefit. (In such a case, however, it must have been almost invariable to sue on the contractual action to be mentioned, the measure of damages being usually greater.) Moreover, the *condictio* now had an extraordinary consequence. If *X* had handed over his cow, *Y*'s horse to be given later in exchange, then *X* could change his mind at any time before the horse was handed over and the contract complete and could use the *condictio (propter poenitentiam)* to recover his cow. However, whatever may have been the position in classical law when there was no general contractual remedy and the *condictio* was practically quasi-contractual, the *condictio* had sufficient contractual flavour by Justinian's time for it not to lie if, e.g., the risk in the horse had by agreement vested in *X* before *traditio* and the horse had died. So where the contractual action did not lie neither did the *condictio*.

The contractual remedy that was gradually provided has various names, some of which would have been exotic and even incomprehensible to the classics: *actio praescriptis verbis*, *actio civilis incerti*, *actio civilis in factum* are just three. The first name is probably the most uniform and is derived from

the practice of inserting a statement of the particular facts at the beginning of the *formula* (whilst the latter still lasted). The action apparently had attributes of both *in factum* actions and *bonae fidei iudicia*.

The remedies mentioned arose only upon an executed contract — *i.e.* where one side had completed his part. A purely executory contract remained unenforceable to the end. This necessity for performance has attracted the name 'real' to these innominate contracts, but whilst many of the more important of these did involve a handing over of a *res*, the principle was wider and it is best to keep the title for the earlier-developed real contracts.

The Digest classifies the contracts into four: (1) *do ut des*: a *res* for a *res* (exchange or *permutatio*); (2) *do ut facias*: a *res* for a service (*e.g.* a *res* for a promise to manumit a natural son), including a forbearance; (3) *facio ut des* (*e.g.* *transactio*, compromise of an action in return for a promise of a *res*); (4) *facio ut facias*: a service for a service. They were called innominate because they had no title such as 'real', 'consensual' or 'verbal'. However, some of the more common did have definite names. The more important were —

1. *Permutatio*

Permutatio was the contract of exchange. It developed after it became settled that the agreement was not covered by sale. Many of the rules became the same as in sale; thus the aedilician warranty against latent defects came to apply in the same way. However, in exchange there was a duty to pass ownership as well as to give vacant possession. This meant that the transferee could sue for a defect in title before eviction and that there was no *actio praescriptis verbis* if the transferor had not given *dominium* — presumably, however, he still had a *condictio*. Risk in the untransferred *res* normally passed upon transfer of the other *res*: the holder was liable for *culpa*, but never it seems for *custodia*.

2. *Aestimatum*

Aestimatum, as seen, was a sale or return transaction. The transferee would normally be concerned to sell if he could, but he had the option of keeping the *res* when the date came after which no return was possible. The transferee might be

paid a sum by the transferor, but he might also be a completely free agent. *Dominium* would remain with the transferor until the chance of return was gone. Risk depended upon agreement, but otherwise it lay apparently on the party that first proposed the arrangement. If this were not clear, the transferor would be subject to risk but the transferee would be liable for *culpa*.

3. *Precarium*

Precarium was a peculiar contract because it was unilateral and essentially gratuitous. It was a tenancy at will, usually of land, but eventually of other *res* too. There was no set period as in *commodatum*, and the *precario tenens* normally had *possessio*. The owner's remedy was the interdict *de precario*, but under Justinian, at least, there was also an *actio praescriptis verbis*. The tenant was liable for *dolus* alone.

4. *Transactio*

Transactio was compromise of an action. The plaintiff could formally bar his right of action; if he agreed informally to do so, the defendant would thenceforth have an *exceptio*. If the release was made in return for the promise of some consideration, then an *actio praescriptis verbis* lay to enforce it.

(F) *Pacta Vestita*

When an agreement that was reached did not come within the categories described, it came to be called *pactum*. The word had originally meant a special type of agreement, one made as a compromise of a legal liability. From the Twelve Tables a *pactum* discharged delictual liability at civil law, and perhaps this rule had a considerable effect thereafter on the history of *pacta*.

Pacta were, generally speaking, without any direct legal force (*nuda*). Occasionally they might give rise to a natural obligation, e.g. one for interest on a *mutuum*. An *exceptio pacti de non petendo* could be used to defeat any action where there had been an agreement not to sue. The praetor thus extended the civil law rule in respect of delict, where the pact abolished the *obligatio*, to all cases of obligations.

In certain cases *pacta* became enforceable (*vestita*). The first and the most general in importance were those annexed

to existing contracts (*pacta adiecta*). Pacts made at the time the contract was made (*in continenti facta*) came to be regarded as part of the contract itself and enforceable by the contractual action itself (e.g. the *actio empti*). The majority of such contracts would involve *bonae fidei iudicia* and the *ex fide bona* would make such an incorporation natural and easy. However, the process extended to *mutuum* which was *stricti iuris*. Pacts made later (*ex intervallo*) might be such that they completely changed the contract and in reality substituted a new one. If the subject-matter was a consensual contract this would be fully effective: the first contract would be dissolved by *contrarius consensus* and a new contract would be established. In other contracts and where the pacts did not go to the root of the agreement there was only a limited effect. The *pacta* could be pleaded only in defence, and so only when they lessened liability.

In a few cases the praetor gave *actiones in factum* to enforce independent agreements (*pacta praetoria*). One such case was the *constitutum debiti*, which was an informal promise to discharge some subsisting liability. It began as a promise to pay a debt sanctioned by the *stricti iuris* action *certae pecuniae creditae*, which did not enable the plaintiff to recover interest on his debt even when the debtor was *in mora*. The *constitutum* was normally used to supplement the civil liability by naming a fixed date for payment and allowing interest thereafter. Just as the civil action could carry a penal wager of a third (*sponsio*) at the option of the plaintiff, so the praetor allowed a *sponsio* of a half of the damages recovered, and these damages would cover any loss consequential upon delay in payment. It was, in fact, a reinforcement of a debt — or part of a debt. While payment or release of the principal debt discharged the *constitutum* also, other discharging factors (e.g. death) might well leave the *constitutum* effective (e.g. against the *heres*). Ultimately the *constitutum* was extended to cover *res* other than money: fungibles first, then any *res* owed. It could reinforce a debt as a surety and even an *obligatio naturalis*.

Besides the *constitutum* for one's own debt (*debiti proprii*) the praetor later enforced one for another's debt (*debiti alieni*). This would, of course, be a form of suretyship and it perhaps originated in cases where the principal debt already existed and the 'surety' induced the creditor to delay suing upon it.

In some ways it was more stringent than *fideiussio* since, e.g., the surety by *constitutum* remained liable even after the debt had been barred by lapse of time against the principal debtor. Along with *mandatum qualificatum* it was largely assimilated to *fideiussio* under Justinian.

The remedy in both forms of *constitutum* was the *actio de pecunia constituta*. Neither case was in any way a novation: the original debt and the *constitutum* remained always distinct and either was enforceable; only satisfaction or release of one barred the other. By Justinian the penal *sponsio* was gone. The form *debiti proprii* had also died out by then.

Another form of *pactum praetorium* was *receptum*, of which there were three forms. The first (*argentarii*) was a banker's promise to settle his client's debt. It was enforceable by an *actio receptitia* without any penal *sponsio*. It was fused with *constitutum debiti* by Justinian.

Receptum arbitri occurred where two parties in dispute, having agreed upon arbitration, requested another to act as arbitrator and he consented even informally. The praetor used his executive powers to force him to arbitrate unless he had a valid excuse.

The last form of *receptum* (*nautarum, cauponum, stabulariorum*) was an agreement whereby a ship's master, an innkeeper or a stablekeeper undertook that goods of the promisee upon the ship or premises would remain safe. It was probably more extensive in range than the liability under *locatio conductio* itself. Under Justinian it was implied upon the promisee's entry, and also it was supplemented by a liability in quasi-delict (*post*, p. 422).

The last type of *pacta vestita* were those made actionable by imperial enactment (*legitima*). Examples are the *pactum dotis*, any informal agreement to give a *dos* after Theodosius II, and the *pactum donationis*, an informal promise to make a gift made actionable by Justinian, as seen in the law of property.

(G) Limits of Contractual Obligation

The effects of a contractual obligation were confined to the parties themselves: no one not a party to the contract could, in general, acquire rights or incur obligations under it. Thus Gaius tells us that an obligation cannot *begin* in the *heres* under a contract entered into by his ancestor. But an heir

could of course *inherit* the right under such a contract, and, where it was not purely personal in character, the burden as well. The fact that the rights acquired by slaves or sons in power accrued to the *paterfamilias* is not an exception to the rule, for they were in a sense his and merely represented him: they spoke with his voice. There were a few exceptions before Justinian, which need not be considered. Justinian, in the cases already noted, violated the logic of the rule laid down by Gaius with respect to the heir, who could now be bound or entitled under a promise or a stipulation of the testator or ancestor. The *actiones adiectitiae qualitatis*, of course, formed an important group of exceptions. Apart from these, if *A* entered into a contract with *B* for the benefit of *C*, *C* could not enforce the obligation, not being within the contract; neither could *A*, for though he was a party to the contract he had no interest in its performance. The practical difficulty could be surmounted by *A*'s exacting a penal stipulation from *B* in case of *B*'s non-performance in respect of *C*. Alternatively, *A* could contract with *B* in his own interest, and then by a mandate assign the benefit of the contract to *C*, who, however, must sue in *A*'s name. If *A*, however, has a real *interesse* in the performance of the contract in *C*'s favour, he can maintain an action for non-performance, *e.g.* where *B* promises *A* to pay *C* money which *A* owes *C*. On the other hand, if *A* promised *B* that *C* would give or do something for *B*, apart from Justinian's legislation where *C* was *A*'s heir and bound to perform, *C* would not be bound to *B*, nor could *B* sue *A*, for *A* had made no undertaking for himself. Yet if *A* undertook to see that *C* would discharge the obligation, this had the same effect as if he had undertaken the obligation himself. If not, *B* ought to take a penal stipulation from *A* in case of *C*'s non-performance, and so protect himself. All in all, the rules were about as strict as the English rules of privity.

III

Quasi-Contract

The classification by Justinian of obligations as *quasi ex contractu* is hardly justifiable in strict logic. Under its title he

assembles a mass of liabilities that have very little in common beyond assuredly not being either contract or delict. There is certainly no general principle like the *consensus* of the one or the culpable wrongdoing of the other. Some instances are truly close to contract, however, and the legal effects are in the main closer to those of contract than delict; so there is some justification for their treatment alongside contract and thus for Justinian's terminology.

(A) *Negotiorum Gestio*

Negotiorum gestio literally means just the conducting of affairs; by implication, someone else's affairs. This meaning remained in some cases, but one especial connotation arose that came to narrow the primary legal meaning of the term. The evolution of *mandatum* excluded the need to use the term in its general meaning in the commonest case — voluntary agency. It was thus that in classical and later law *negotiorum gestio* primarily meant the management of another's affairs without his authority; e.g. the repair of a neighbour's house during his absence to prevent the property from falling down or the taking up of the defence to an action brought against an absent defendant. It was akin to *mandatum* and many rules were analogous; however, there was, of course, no previous authorisation and subsequent ratification was irrelevant. The *gestio* gave rise at first to *actiones in factum* and later to *bonae fidei iudicia*: the *actio negotiorum gestorum directa* was the remedy of the principal (*dominus negotii*) for the profits of management or damages for mismanagement; the *actio contraria* that of the *gestor* for his expenses and liabilities. The *gestor* could not claim if: (a) the work was not sufficiently urgent for his intervention to be reasonable; (b) he had been previously forbidden to act by the principal; (c) the work was not useful at the moment it was effected; (d) he had any interest himself in the *gestio* (e.g. as common owner or as wrongdoer lessening his liability) unless he could have achieved his interest without benefiting the principal; (e) he intended the work to be a gift to the principal — he must at the time have intended to be reimbursed. The fact that the *gestio* turned out later to have been of no avail, e.g. the house was later destroyed by earthquake or the action was eventually lost,

made no difference to the right of action of the *gestor*. He was liable for *culpa*, except where there had been extreme urgency; then, only for *dolus*. There was no liability for *infamia* as there was in *mandatum*. The *gestor* could claim necessary expenses only to the extent of the benefit conferred on the principal, assessed as at the time of *gestio*.

A special case arose where someone buried a corpse with the intention of claiming the necessary expenses from the heir. Here an *actio in factum (funeraria)* lay even if the *heres* had forbidden the act, provided the burial was urgently needed.

(B) Various Cases

A variety of further obligations are also grouped as *quasi ex contractu*.

(1) Wardship: the obligations on each side were so classified. In *tutela* there was the *actio tutelae directae* for the ward and the *contraria* for the tutor; in *cura* the remedy was the *actio negotiorum gestorum* — an instance of the general use of the term *negotiorum gestio*. One who acted as *tutor* without proper authority was put under similar obligations. The remedy was originally probably the *actio negotiorum gestorum*, but in late law the *actio protutelae*.

(2) Common ownership: obligations could arise, e.g., where one common owner had alone enjoyed the property or had been put to necessary expense upon it. It was a quasi-contract analogous to the contract of *societas*, which would exist if the co-ownership had begun by an agreement or had been expressly maintained by agreement. In the case of co-heirs the obligations were sanctioned by the *actio familiae erciscundae*, in other cases by the *actio communi dividundo*.

(3) Heirs and *fiduciarii*: their obligations to satisfy the claims of legatees and *fideicommissarii* were so classed.

(C) *Condictio*

Condictio was the remedy used to develop a large body of quasi-contractual obligations on the general principle of unjustified enrichment. In classical times it probably lay only when money or fungibles or a *certa res* had been handed over, but later a *condictio incerti* lay where there had been a benefit

of another sort, *e.g.* a service or forbearance. The most prominent case is the *condictio indebiti*. Under it a person who received money not due to him, but paid by another through mistake of fact and received in good faith, was bound to repay it. A natural obligation was not an *indebitum* and so the *condictio* was unavailable, but a *condictio* lay where the obligation was merely conditional and wherever a civil obligation was defeasible by a praetorian *exceptio*. If the receiver were in bad faith, the *condictio furtiva* would normally lie instead because his act would be theft. Exceptionally, however, money paid by mistake could not be recovered; *e.g.* in the case of a *lis crescens*, *i.e.* where the amount recovered was increased if the liability was denied, as in an action under the *lex Aquilia*; or where, in the time of Gaius, a specific legacy had been given *per damnationem*; or where, in the time of Justinian, a legacy or *fideicommissum* had been bequeathed to some pious foundation. In other words, if a person paid a claim which he thought was due on a *lis crescens* and then found that he had been mistaken and the money was not due at all, he could not recover, because by payment, which was in the nature of a compromise, he had really obtained a kind of advantage, *i.e.* he had got rid of possible liability of having to pay an increased amount if the facts had turned out otherwise. The rule seems a trifle odd if there was a genuine error of fact, especially since the burden of proof would be heavy on the payer. However, the rule does have the advantage of excluding further litigation in those special cases where the law has wished to discourage the defendant from trying to win upon points of proof rather than on actual truth.

Besides the case of *indebiti solutio* the *condictio* lay as follows:

(1) *ob turpem causam*, where payment was received for an immoral or illegal purpose, but only if the payer himself was not to blame; *e.g.* where he paid in order to induce a criminal not to commit a crime, not where he paid to have the crime committed;

(2) *ob iniustam causam*, where the payment was void or voidable, but in the former case only if the receiver had become owner by using and consuming the *res* — otherwise the ownership would remain in the payer (*e.g.* a husband making a gift to his wife) and a *vindicatio* would lie;

(3) *causa data causa non secuta* (*ob causam datorum*), where there was a total failure of consideration, e.g. where *dos* was paid over prematurely and the marriage never occurred ;

(4) *furtiva*, under which the owner of a *res* could claim the *res* or its value from the thief ; it was unique in that ownership had not passed to the thief and the plaintiff was therefore suing for his own property, not for something to be conveyed (*dari*) to him. This breach of the character of *condictiones* may be explained by the action's originally having lain only where the *res* had been destroyed or lost and then by its being extended to all cases for the benefit of the owner. It was certainly more popular than the more logically correct *vindicatio*, to which it was an alternative. It was compensatory, not penal, and therefore lay for and against the *heres*.

In Justinian's time there were other quasi-contractual *condictiones*, e.g. where one liable for *custodia* had compensated the owner, who later recovered the *res* from another.

(D) Other Possible Cases

Various other obligations could be classed here. The most important was the *obligatio* to produce a *res* when one was sued on an *actio ad exhibendum*. The action was normally preliminary to a real action or interdict, and it lay against any holder or anyone who had fraudulently parted with possession. A holder who did not produce was liable in damages upon the action.

IV

Transfer and Discharge of Contractual and Quasi-Contractual Obligations

(A) Transfer

The subject of the transfer or assignment of obligations has two aspects. How, if at all, could (a) the liability and (b) the benefit be transferred by the act of the parties ?

In describing the methods by which single items of tangible property could be transferred by one man to another, Gaius remarks that these methods of transfer have no application to

obligations. Obligations were not only *res incorporales* but were regarded by the Romans as personal to the contracting parties and, in some cases, so personal as not even to be capable of passing with the rest of the *iuris universitas* to the heir.

The only manner in which *liability* could be transferred was by novation, *i.e.* the person to whom the obligation was due had to consent. *A, e.g., owes B fifty aurei*; the only method by which *A's* liability can be transferred to *C*, so as to make *C B's* debtor in lieu of *A*, is for all three to agree; *B* either taking a stipulation from *C* at *A's* request (*expromissio*), or, with the consent of *A* and *C*, making a *transscriptio a persona in personam*. The same rule, that liability under a contract can only be transferred (by act of the parties) with the creditor's consent, obtains in English law, and, obviously, the principle is a sound one. It would be inequitable that one's debtor should have the right to escape further liability on his contract by substituting some man of straw to perform it.

Originally the *benefit* also could only be transferred by novation, the person to whom the right was to be transferred taking, at the request of the original creditor, a new stipulation from the debtor, which operated to discharge the obligation owed to the original creditor and to create a new one in favour of the transferee. Novation is not strictly a transfer of the obligation, but the extinction of an existing obligation and the substitution of a new one. Under the formulary procedure, however, the practice arose for the creditor to give the transferee a mandate to recover the debt, nominally as agent (*procurator*) for the creditor, but really on his own behalf (*i.e.* the transferee was to retain the debt when recovered). In classical law it may have been necessary to appoint him formally as *cognitor*, and only later perhaps could one appoint informally as *procurator in rem suam*. In any case, the *formula* was constructed in the Rutilian fashion with the assignor's name in the *intentio*, the assignee's in the *condemnatio*. This, of course, operated as an assignment, not of the benefit under the contract as such, but of the right to sue for it, and even as an assignment of a right of action it was defective, for, until the transferee sued and *litis contestatio* was reached, the assignment became void if the original creditor revoked his mandate or if the creditor or transferee died. Further, the

transferor could still receive payment or grant a release from the liability. Later, however, but probably not generally till Justinian, the principle became admitted that from the moment when the transferee gave the debtor notice of the mandate the original creditor could not accept payment or release the debt; the debtor with notice who paid was not discharged; and revocation, express or by death, allowed the transferee to bring an *actio utilis* in his own name. Such assignments were usually in discharge of debts owed by the assignor to the assignee and Anastasius enacted that the assignee of a debt could recover no more than he gave for it, presumably to discourage speculators in litigation.

As seen in the law of succession, in the developed law rights and liabilities, except where specially destroyed by death, passed with the *hereditas*. Instances have also been seen where a transfer of rights of action was enforceable by law, e.g. where the creditor received payment from a surety or where a mandatary had such a right. This is sometimes known as *cessio legis*.

(B) Discharge

An obligation arising from a contract might be extinguished or destroyed —

- (1) By *contrarius actus*.
- (2) By performance.
- (3) By novation.
- (4) By subsequent impossibility.
- (5) By operation of law.
- (6) In some few cases, by death.
- (7) *Ope exceptionis*.

(1) *Contrarius actus*. According to the theory of the civil law, the *iuris vinculum* (of which an obligation consisted) having been attached or tied to the parties when the contract was created, had to be untied by reversing the process. Thus a debt created by *nexum* had to be released by *nexi solutio*, and probably, at first, this process of discharge was necessary even though the debtor had morally discharged himself by payment in full. As described by Gaius, however, *nexi solutio* seems to be a form of discharge when actual payment had not been made, for he describes it as another type of fictitious performance, the process being as follows — The debtor, in the pre-

sence of five witnesses and a *libripens*, held a piece of copper in his hand and said, in effect, to his creditor, 'I weigh out to you this first and last pound of the money I stand bound to pay you, and so release myself by means of this copper and these copper scales from my obligation'. He then struck the scales with the copper and gave it to his creditor, as if in full payment. Besides the case of *nexum*, *nexi solutio* was the proper mode of release from judgment debts, legacies *per damnationem*, and probably from every form of *damnatio*.

An obligation formed *re* would be dissolved by the thing's being returned (or, in the case of *pignus*, redelivery after due payment made); whence it seems that in the real contracts the *contrarius actus* was in fact performance of the obligation which the contract created. In the case of a verbal contract, however, the *contrarius actus* was not performance but a release by solemn words (*contrariis verbis*), without payment actually taking place. This *acceptilatio*, as it was called, amounted to another *imaginaria solutio* (fictitious performance). The usual form of *acceptilatio* was, '*Quod ego tibi promisi, habesne acceptum?*', '*Habeo acceptum*'; and, of course, applied only to discharge an obligation created *verbis*. If a debt arose in any other manner (e.g. on a *mutuum*), it could only be discharged in this way by novation, *i.e.* the debt was first novated by being made the object of a *stipulatio* and then discharged by *acceptilatio*. Aquilius Gallus invented a general form of stipulation (*stipulatio Aquiliana*) by means of which any number of obligations, of whatever kind, delictual ones excepted, due from one person to another could be turned (by novation) into a single obligation, being summed up in one comprehensive stipulation and then, if it was so desired, extinguished by *acceptilatio*. In the case of the literal contracts, in the time of Gaius, the *contrarius actus* was *accepti relatio*, *i.e.* an entry on the opposite side to the *expensilatio*, that payment had been made, and this also might be an *imaginaria solutio*, for it was valid even though payment was not in fact made. Lastly, in relation to the consensual contracts, *contrarius actus* meant that, having taken their origin in consent or agreement, such contracts could be dissolved in the same way, so long as neither party had begun performance.

Originally, no doubt, the formal methods of release (e.g. *acceptilatio*) were necessary even upon due performance of a

formal obligation, but in historical times they would only be used for the purpose of a voluntary discharge. *Nexi solutio* was necessary for real as well as for fictitious discharge from *nexum* because it involved a release from bondage as well as from debt. The formal releases had their disadvantages; thus, in *acceptilatio* it was only late in the classical period that it was settled that part only of a debt could be so discharged.

(2) Performance, or *solutio* in the usual sense, is not only the natural manner of discharging a contract but, usually, the sole manner actually contemplated by the parties. When, e.g., *A* agrees to sell and *B* to buy a horse for fifty *aurei*, the only method of discharge in their contemplation is that *A* shall deliver the horse and *B* duly pay the price. This method is accordingly mentioned in the Institutes, though probably in early times a formal release (e.g. by *nexi solutio*) might also, in some cases, be necessary. Gaius tells us that an obligation was extinguished by payment (or performance) of what was due, though if the creditor accepted something other than what was actually due there was a dispute. The Sabinians maintained that the obligation was *ipso iure* extinguished, the Proculians that at law the obligation remained, but that the debtor could defeat an action brought upon it by the *exceptio doli*. Justinian adopted the former opinion, for he tells us that in his time all obligations were extinguished by payment of the thing due or, if the creditor agreed, by giving something else in its place, and he adds that it made no difference whether the debtor himself performed the contract or someone else for him, and this though the performance by the third person was without the debtor's knowledge, or even against his will. Justinian adds that in cases of suretyship, payment by either principal or surety extinguishes the obligation as against all parties.

If the obligation was alternative, e.g. to give Stichus or Pamphilus, then unless there was clear indication in the act making the obligation (e.g. a will or contract), the choice of performance was with the debtor except in the one case of legacy *per vindicationem* where the choice was with the legatee. Destruction of one *res* or impossibility of one performance before there had been a formal election (where possible, as in legacy) necessitated *solutio* of the other: destruction of both,

of course, released. If a debtor made *solutio* of both by mistake, a *condictio indebiti* would normally lie to recover whichever he chose, provided he had had the option in the first place.

Where there were joint creditors or debtors much depended on the form of creation of the obligation. If the obligation was divisible, *i.e.* could be performed in parts, *e.g.* to pay 100 *sesterces*, and there was no indication that each should be entitled or liable to the whole, then *solutio* would take place by proportionate division of the performance to the joint creditors or by the joint debtors; *e.g.* if there were two, then each would receive or each pay 50 *sesterces*. However, where the obligation was created so as to make each person entitled or liable for the whole (*in solidum*), yet only one performance was required (*e.g.* where *A* answers once '*spondeo*' to stipulations of the same thing by *B* and *C*), there was what is known as correality. In this case payment of all to one creditor or by one debtor concluded the obligation; so did other forms of release including *litis contestatio* — joinder of action in a formulary action. Nor was there any general principle that the co-creditors or co-debtors could claim from the others if *solutio* had been made: it would depend on the nature of their relationship *inter se* (*e.g.* *socii*). Correality was the normal case where the obligation was indivisible by nature or by intention of the parties. However, in a few cases, *e.g.* where there were joint tutors or mandataries, the obligation was not discharged by *litis contestatio* in an action against one: the others were released only by the other's *solutio*.

(3) Novation. Here an existing obligation was destroyed by the fact that a new one was substituted for it, and, since the literal contract was obsolete in Justinian's time, the only method of novation dealt with in his Institutes is a novation by means of a *stipulatio*. Novation might take three possible forms: (i) the substitution of a new creditor for the former creditor; (ii) of a new debtor for the former debtor (*delegatio*, *expromissio*); or (iii) the conversion of an existing obligation between the same parties into a stipulation; but in this case novation could not take place if the original obligation arose from a verbal contract, unless the new stipulation contained some new term such as the addition of a surety or a condition. If, however, the new element consisted of a condition, the

novation took place only when the condition was fulfilled ; until then the old obligation subsisted, but, if before fulfilment the creditor sued upon the old contract, he could be defeated by the *exceptio doli*.

For a novation to be valid the old obligation might even be a natural one, and, conversely, even though the new obligation were natural merely, the old obligation was extinguished, so that in such case the creditor could not sue on either obligation. So if a pupil, *X*, promised *A*, without his tutor's authority, to pay *B*'s debt to *A*, there was a good novation, and since this extinguished the debt from *B* to *A* and the new obligation between *A* and *X* was natural only (being made without authority), *A* had no right of action on either obligation. But if the novating promise was by a slave, the old debt was not extinguished, which seems illogical, for the promise of a slave was capable of creating a natural obligation ; but it is not really so, for a promise by a slave was not a verbal obligation, though it created a natural obligation, and a verbal obligation was essential to novation. Justinian tells us that formerly difficulty was caused in consequence of the rule that the *stipulatio* operated as a novation only when the parties so intended, and not when they meant to create a second independent obligation and that many (artificial) criteria were laid down to determine what the intention of the parties had been. He therefore provided that a stipulation should operate as a novation only where the parties expressly declared that their object in making the new contract was to extinguish the old one.

(4) Subsequent impossibility. An obligation was dissolved where its object became impossible without the fault or *mora* of the debtor, *e.g.* when the thing in question was absolutely destroyed.

(5) Operation of law.

(a) In the time of Gaius an obligation was extinguished when an action to enforce it reached the stage of *litis contestatio*. Thereupon a new liability arose, *viz.* that the debtor should be condemned if found in the wrong ; just as after judgment his obligation was to satisfy it. This applied only in cases of *iudicia legitima in personam*. Actions *in rem* and those *imperio continentia* did not 'consume' the *obligatio* (there would not be one in an action *in rem*), but the effect was much the same

since the praetor would allow an *exceptio rei iudicatae vel in iudicium deductae*. In Justinian's time *litis contestatio* probably did not have this consumptive effect and obligations would be discharged by judgment alone, the *exceptio* now being *rei iudicatae* alone. In cases of hardship the *consumptio* was not always fatal: there was always the possibility of *restitutio in integrum* in appropriate cases.

(b) *Capitis deminutio*, by destroying the legal personality of the debtor, also extinguished his contractual obligations, but the praetor relieved against this by granting *restitutio in integrum*, or an *actio utilis* against those who now held the debtor's property.

(c) Prescription (lapse of time) might have the effect of extinguishing an obligation, the periods of limitation varying greatly.

(d) Merger (*confusio*) operated where the right to enforce the obligation and the liability to perform it became vested absolutely in one and the same individual, e.g. if *A* who owes *B* money makes *B* his heir.

Other cases of operation of law existed, e.g. *compensatio*, involving a counterclaim or set-off which might destroy part or all of an obligation.

(6) Exceptionally, the death of a party might extinguish a contractual obligation, e.g. in *societas* (except *vectigalis*), *mandatum*, or a contract for personal service (e.g. *locatio conductio operarum*). The general rule, however, was that contractual rights and liabilities passed on death to the heir.

(7) *Ope exceptionis*. Where an *obligatio* was met by an *exceptio*, i.e. a defence inserted in the *formula*, the obligation was not destroyed; if the *exceptio* was proved the action on the obligation failed but the obligation itself remained. If the *exceptio* was one which the defendant could always plead, the obligation remained for ever incapable of being sued upon with success; if, however, the *exceptio* were limited, e.g. were based upon an agreement on the part of the plaintiff not to sue within six months, then, the limit having expired, the *exceptio* could no longer be pleaded in answer to a new action. *Pactum de non petendo*, an informal agreement not to sue, operated under the praetorian edict as a defence, *exceptio pacti*. In *bonae fidei iudicia* the *exceptio*, of course, need not be pleaded. The *pactum* differed from release at civil law in that

normally it operated to protect only one of joint debtors where there was correalty; whereas a formal release discharged all of them.

V

Delict

The obligation *ex delicto* was merely to make satisfaction for a wrong inflicted: it arose from the wrongful act (*ex maleficio*). There was no pre-existing *obligatio*, because *obligatio* meant to the jurist some asset, some right assessable in money terms. Modern lawyers have proceeded to look behind the wrong and construct theories of pre-existing general duties and rights *in rem*, and scholars have similarly theorised on the rules of Roman law. However, the Romans themselves maintained their practical habit of treating of particular types of happening and the consequences thereof and never indulged in generalisations.

It has been seen already that delicts were regarded as obligations very late, perhaps only in the classical period, and certainly a considerable time after the notion had been derived from what remained the primary obligation — contract. Hitherto they had been treated very much on their own merits and not brought into any classification. As it is, they do not fit well into the pattern of obligations.

Delicts have their origin in the early period of law when acts are recognised as wrongs deserving of retribution and remedy, but before there is any distinction between crime and civil wrong and even before there is any legal enforcement. The first rules of law in the field are those that seek to regulate the customary processes of revenge. Self-help (or self-satisfaction!) remains the remedy, but the community lays down its rules to prevent that remedy from being overdone. Indiscriminate retaliation leads to vendettas and nothing is more harmful to the peace and progress of the community. So the first laws seek to eliminate retaliation where the wrong is not great (and therefore indignation is more easily bought off) and to provide safeguards of proper procedure where the wrong is too serious for the law to insist upon a money penalty instead. The first rules look savage, but that is only because they deal with savage customs. One of the earliest rules of

Roman law is extremely benign: the law will not regard retaliation as justified and exempt from counter-action if the parties have agreed on some other satisfaction. Even in serious cases the Romans were early striving for an elimination of the socially wasteful retaliation.

These earliest rules have two major features: they seek to achieve compensation for the victim and they serve to assuage the indignation both of him and of society. In many systems, especially the Common Law, these two features gradually separate and the first comes to rest in the law of civil wrongs, the second in the criminal jurisdiction. It was not so in Roman law. Partly because the Roman criminal law was not of the same standard as the civil and took a long time to become effective and partly because the Romans never saw any reason to mitigate rules for the benefit of a wrongdoer, their law of delict always possessed a strong penal flavour, even where it came more and more to concentrate upon compensation. It is thus that Roman delict has a much more 'criminal' aspect than English tort, which now is almost entirely concerned to compensate. (Vindictive damages in torts such as defamation and the interesting historical remnant of multiple damages for pound breach are penal survivals in English law.)

Regulated retaliation (*talio*) and crude tables of penalties (e.g. a set sum for a broken nose, another for a tooth lost) gradually give way to a principle acknowledging individual assessment of damages in each case. So it happened in Roman law, the damages, however, always involving also some element of penalty. In some cases (e.g. *furtum*) the purely compensatory element (the *condictio*) became separated from the predominantly penal (*actio furti*), but the tendency was not general and, even where it occurred, was by no means complete. As the administration of the criminal law became more efficient under the Empire, certain delicts (e.g. *furtum*) became less sued upon, the criminal sanctions being more effective as a deterrent and the tempting multiple damages of the civil action almost always being illusory because the normal thief had no means to compensate, let alone pay a money penalty. Yet the strengthening of the criminal law came too late to alter the penal character of delict which was settled by the end of the Republic.

The penal element had great consequences in the law of delict. Firstly, it meant that liability depended always upon fault. Most delicts required intention (including, perhaps, recklessness in some cases); one, *damnum iniuria datum*, admitted liability also for *culpa*, which came to mean negligence. *Culpa* originally seems to have been little more than the expression of an underlying idea of responsibility for the act complained of — a matter of causation rather than of mental element. Where an act is done in certain circumstances blame is automatically attributed to the actor and his state of mind is irrelevant. This seems still to have been the attitude of the classical lawyers — almost ‘let the facts speak for themselves’. Only in Byzantine law was the idea of negligence really introduced and much discussed. It is this early notion of *culpa* that accounts for certain resemblances to strict, rather than fault, liability in some of the lesser delicts, particularly those involving danger or damage to a neighbour’s property. If one built on one’s land and the result was that water flooded on to one’s neighbour’s land, then, even though the result was not foreseeable and there was no lack of care, one was liable to compensate for loss. However, these cases are scarcely delicts: they are much more compensatory, with little or no penal character, and they mostly depend on the administrative action of the praetor (although the *actio aquae pluviae arcendae* in the example mentioned was a civil action which arose before there was a concept of delict and which survived to exist alongside and be assimilated to the praetorian interdicts and other remedies for neighbours).

Secondly, delict’s penal nature resulted in the liability’s being markedly personal. The culprit could not escape revenge whilst he lived. So even *capitis deminutio* made no difference to the liability: the rule ‘*noxa caput sequitur*’ meant that the new *dominus* or *paterfamilias* became noxally liable for the culprit’s previous act and the emancipated or manumitted culprit became directly liable for it. Death, however, was normally fatal to the *obligatio*. Death of the victim did not normally destroy the right of action for his heir in the developed law, the most important exception being *iniuria*; but death of the culprit ended liability, except that from the Empire onwards there was a virtually quasi-contractual liability to the extent of any benefit the *heres* might have received by

virtue of the delict (*e.g.* the killing of a slave nominated *heres* in priority to the killer). The remedy in the latter case is disputed: a *condictio* would be most appropriate, but the delictual action may have lain with a *taxatio* clause limiting the damages to be awarded in the *condemnatio*. Noxal liability will show very well the personal nature of delict and the survival of the revenge idea.

Terminology was not always exact. While *delictum* and *maleficium* were the normal names for the civil wrong, *crimen* for a crime, there are several instances of misnomer.

Delict was to the classical jurists an *obligatio* and therefore only civil law wrongs were so counted. Thus Gaius does not discuss any of the praetorian 'delicts', but he is not ruthless in his exclusion: if the wrong itself began as civil the fact that the remedies are now praetorian (*e.g.* *furtum manifestum* and *iniuria*) will not prevent discussion, and praetorian extensions (*e.g.* on the *lex Aquilia*) will naturally be discussed when one is talking of the limits of the civil actions. He even mentions a purely praetorian wrong, *servi corruptio*, alongside the civil *furtum*, but there is no discussion of it.

Penal rules are usually directed against acts, rarely against omissions; even rules of pure compensation do not often affect omissions. It may safely be said that there is no evidence of liability in delict for pure omission in Roman law. Some delicts (*e.g.* *furtum*) require an act (*contrectatio*) as a matter of definition — others nearly so by implication: '*datum*' in *damnum iniuria datum* is a term probably more active than the English equivalents here, 'caused' or 'occasioned' — it is 'inflicted'. In any case which has a look of omission and yet there is liability, the explanation is probably that the Romans were satisfied as a matter of common-sense that there was sufficient causation for responsibility. Modern analysts will explain the rules in terms of relation back to a wrongful act (*e.g.* putting too heavy a burden on one's back or mounting a horse one cannot later control) or in terms of prior assumption of duty (*e.g.* the doctor who operates successfully and then abandons the after-care). The Romans, however, have a tendency to avoid the necessity for such explanations by rather dishonestly phrasing the facts in a positive construction: he who falls asleep in charge of a fire is liable for watching badly, not for failure to watch. Whatever their approach the instinct

of the Romans seems always to have led them to conclusions the same as our more analytical methods. They probably would not have given any action in *iniuria* where one maliciously failed to warn a pedestrian that the path was slippery, even though it was not apparently so and one wished to see him look ridiculous. Nor would there probably have been liability for *damnum iniuria datum* where one failed to rescue a boy slave from drowning when one could safely and easily do so. The only real exceptions occur again in the scarcely delictual praetorian 'neighbour wrongs' — one can be liable where a ditch, dug long before one was owner, causes flooding of one's neighbour's land.

Both Gaius and Justinian treat of four delicts. Gaius is justified because there were only four major civil wrongs in his time, the other civil ones being either not regarded as delictual or too specialised for an elementary work. Justinian's omission of the major praetorian delicts is quite unjustified, for by his time merger of *ius civile* and *ius honorarium* was substantially complete. It can be accounted for only by his obsession with fourfold classification (an obsession Gaius had, to a lesser extent, shared). Of the four, *rapina* is really just a praetorian extension of *furtum*, but it is sufficiently distinct to deserve separate treatment.

(A) *Furtum*

Justinian defines *furtum* as 'the dishonest handling of a *res*, or of its use or possession'. Gaius gives no definition, but discusses the elements and adds the necessity for the act's being without the owner's consent (*invito domino*). In the Digest Justinian adopts basically the same definition as in his Institutes but adds the extra mental element of 'a view to gain' (*lucri faciendi gratia*). It is proposed to treat of the delict under the various heads.

(a) The *Res*. This was any *res mobilis in commercio*. Until the early Empire it was thought that land also could be stolen, but, although it was decided that there could be no theft of land, things forming part of land, e.g. standing crops or minerals, could be stolen, the theft itself making them movables. As already seen, *res* forming part of a vacant inheritance (*hereditariae*) had no owner or possessor until the heir took possession, and, even when *usucapio lucrativa* was neutralised

by Hadrian, the rule remained for theft and a new remedy was invented by Marcus Aurelius — the *crimen expilatae hereditatis*. If someone had in such *res* a right less than ownership, e.g. a usufruct or a pledge, such person could sue, and the heir might also have an action after he had entered. *Res divini iuris* were protected adequately by the sacral and criminal law, so there was no need for *furtum* in such cases. *Res derelictae* could not be stolen even if there was theftuous intent. A slave could be stolen like any other *res*; if he consented to his taking he would be guilty as an accomplice; and a runaway slave (*fugitivus*) was deemed to have stolen himself and thus was a *res furtiva* and unable to be usucaped. More surprising are the cases of theft of free persons. *Filiifamiliarum* and wives *in manu* could be stolen, the rule being very old and probably dating from a time when there was little distinction between *potestas* and *dominium*. A man condemned to another under a judgment (*iudicatus*) could also be the object of theft — perhaps, also those *in nexo* or *in mancipio* in early times. Later, a professional gladiator (*auctoratus*) solemnly engaged to a master could also be stolen, although a freeman. His case once again shows clearly the Roman unconcern with general principles where a rule could prove convenient. Here was a definite economic interest, not dissimilar from that of a slave's *dominus*, which the law of *furtum* was appropriate to protect; if any backing was needed for such a rule the old survivals of theft of freemen could give it. These instances remained throughout classical law and they disappeared only when the status on which they hung disappeared. Indeed theft of *filiifamiliarum* — the only case left — was still a possibility under Justinian, although for several centuries other remedies, particularly a special praetorian interdict (*de liberis exhibendis item ducendis*), had been much more frequently used.

It was perfectly possible to steal one's own property if one fraudulently took back the *res* from someone with a positive interest in it. It has been called *furtum possessionis*. A usufructuary and a pledgee were major examples, and apparently anyone with a *ius retentionis* for expenses (e.g. a *bona fide possessor* and a borrower under *commodatum*) could also sue the *dominus*. A deposittee, however, had no such right under Justinian, perhaps because he excluded any *ius retentionis* here.

(b) The act. This was a *contrectatio* or handling: there

was no need for an asportation, at least in the later classical period and afterwards — but most cases would involve an actual taking away. There need be no intent to deprive the owner permanently, and so taking a horse and carriage for a drive was *furtum*, as was unauthorised use of a *res* by the deposittee or *commodatarius*. This has been called *furtum usus*, but this is not really a Roman expression : to them it was just one instance, an extreme one perhaps, of theft, and the *res* was *furtiva* just as in any other case. There was never any clear definition of *contrectatio*, and it seems that there was much controversy throughout Republican and classical jurisprudence as to what constituted theft. Nor did Justinian resolve many of the difficulties. A cause of the confusion was the comparatively late development of the praetorian delict of *dolus*, late enough to have tempted the early jurists to incorporate in theft cases more of fraud and false pretences — *e.g.* employing false weights to cheat a vendor. Impersonation was a sufficient act if it vitiated the payer's consent, and even knowingly receiving something not owned was theft, it seems. Refusal to hand back a pledge when the debt was paid was held to be *furtum*. Appropriating something lost or jetsam from a ship were treated as clear cases of theft. When it appears that it is theft for a debtor to sell a *res* hypothecated to another without that other's consent, one despairs of a definition of *contrectatio* that will cover all cases and the term merely serves to denominate the act in *furtum*.

The act had to be without the owner's consent (*invito domino*). The Romans were not altogether consistent in this particular on the most difficult question of consent fraudulently induced ; they did not achieve the clear, if narrow, line of division that English law has between larceny and false pretences, but in most cases their instincts excluded false pretences from theft. On other issues they applied the criterion vigorously. If the owner consented, then there could be no theft, however guilty the taker's mind. They reached the same conclusions on the 'trap' cases as English law. Mere knowledge and even setting up a situation in which the thief could effect his theft easily (*e.g.* leaving money around) were not sufficient to prevent the taking's being theft, but the handing over of a *res* to one who thought the giver had not seen through his disguise did exclude *furtum*. The classic case was the

approaching of *A*'s slave by *B* to induce the slave to take from *A*; if *A* was told of the plan by the slave and *A* decided to go through with the performance in order to catch *B*, *B* committed neither theft nor the praetorian delict of corrupting a slave. As Gaius says, the taking was not *invito domino* and the slave was not corrupted. Justinian admitted the logic of this view which prevailed in classical law, but ordained that *B* should be liable for both delicts as a sanction for such anti-social behaviour.

(c) The mental element. *Furtum* could be committed only if there was *dolus* — if the defendant was dishonest. The Romans resisted the temptation to allow theft where the borrower used the *res* in circumstances in which it was unreasonable to suppose the owner would not mind. Honesty of belief was the only criterion, although, of course, the unreasonableness might be excellent evidence of dishonesty in many cases. Even an error of law, *e.g.* that a usufructuary may keep the child of an *ancilla*, was not equated to *dolus*.

The element of 'intent to gain' (*animus lucrandi*) was probably not necessary in classical law, and it causes much difficulty. Justinian probably adopted the requirement to deal with the case where a man intentionally destroys a *res* or causes it to be lost. Thus knocking coins out of a person's hand so that they roll into a drain and unchaining a slave or releasing an animal or bird are no more thefts than tearing a toga to shreds. But the difficulties are acute. Taking away a *res* in order to give it to another is clearly theft; so is eating another's cake or igniting his firework. Obviously *lucrum* has to be widely defined: so as to include most feelings of satisfaction other than spite and humanitarianism. One is left with the following proposition: if *X* burned *Y*'s copy of Ovid's poems, then he was guilty only of *damnum iniuria datum* and liable for simple damages if his motive was to annoy *Y* or to rid the world of an obscene book, but he was liable for the multiple damages of *furtum* if he merely wanted paper to start a fire in his grate.

(d) The defendant. Because *infamia* followed upon conviction, there could be no *actio furti* between husband and wife, and no such action became possible after a divorce for acts done during marriage. A praetorian action *in factum* for simple damages (*rerum amotarum*) lay for either party where

the other had absconded with property before a divorce; the husband also had a right to deduct the value from the *dos* instead. The act was, however, still theft: accomplices were liable to the *actio furti* and the *res* was *furtiva*. If the wife was the accomplice, the principal was liable for *furtum*, the wife only for *res amotae*. There could, however, be noxal liability between spouses for thefts by the slave of one from the other. Similar rules applied to others within the household. A *filiusfamilias* could not sue, or be sued by, his *paterfamilias* for theft, but it was *furtum* all the same as far as accomplices and the character of the *res* was concerned. The *peculium castrense*, however, affected the simplicity of the situation: a father was liable for taking *res* within it, and he probably had a *utilis actio* against a theftuous son to the extent of that *peculium*, at least in later law. Even under Justinian the *paterfamilias* had ample powers of chastisement for any wrongs done by those in his home or connected with it. So *furtum domesticum* did not give rise to any *actio furti*, and this concept covered the acts not only of slaves and other members of the household, but also of hired servants, *liberti* of the patron, and clients. But again the *res* was *furtiva* and the accomplices liable.

Obviously, anyone *doli incapax* — including *furiosi* and *infantes* in all cases, and *impuberes* on the facts — could not be guilty, though they could be innocent agents for another's theft.

Accomplices were liable to the same penalties as the principal, provided they assisted *ope consilio*. This appears to have meant that for liability one must have either given physical aid or provided a plan or part of one. Mere encouragement or advice to steal was apparently not enough. However, one could be liable as an accomplice if one intentionally assisted a theft even if one had no particular thief in mind when one acted and without any liaison with the principal; e.g. if X summoned Y to court in order that his property should be left unattended and be easily stolen. Accomplices were liable on the *actio furti* itself and there is little distinction between them and principals. All were individually liable for the penalties, payment by one in no way releasing the others. The *condictio furtiva*, being reipersecutory, not penal, lay only against the principal.

(e) The plaintiff. The *actio furti*, as distinguished from

other remedies on theft, could be brought not merely by the owner, but, according to Gaius and Justinian, by anyone interested in the safety of the thing, and, conversely, the owner could not bring it unless it was to his interest that the thing should not perish. Not everyone who has an interest in the broadest sense can sue; thus a wife cannot sue for a theft from the *dos*. Indeed the cases are so varied that it is difficult to draw any general principles. Modern writers have, however, conveniently classified the kinds of *interesse* that will enable a person to sue on the *actio furti*. The first class involves a positive *interesse*: this means that the holder has a right over the *res* which the law recognises as worthy of protection by this action. In general this class covers only *iura in rem*, such as usufruct, *usus* and *emphyteusis*. The *colonus* is an odd case: he had the action, at least for theft of the fruits: until *perceptio* he had no *ius in rem* over them, and clearly, since the *locator* could withdraw his licence to pick at any moment even in breach of contract, the *colonus* could not sue the *locator* himself for their theft. The usufructuary would have the action against anyone who stole the fruits, even the *dominus*. This common-sense rule, based upon the likelihood of the usufructuary's future ownership, was probably a sufficient warrant for an extension to the similar likelihood in the case of the *colonus* as against third parties. Another positive *interesse* was that of a holder who had a *ius retentionis*, but only certainly against the fraudulent *dominus*: against any other thief there would normally be a full negative *interesse*. Where there was a positive *interesse* the damages were assessed as a multiple of that *interesse*, the owner being usually left with an action also against a larcenous third party for a multiple of the difference of the positive *interesse* and the full value of the *res*.

A negative *interesse* arose where the holder from whom the *res* was stolen was liable for *custodia* — i.e. liable to compensate the owner in the event of theft and any other loss short of *vis maior*. Obviously, such a negative interest was only operative where a third party stole. Common cases would be the *commodatarius* and many, if not all, *conductores operis faciendi* (e.g. a cleaner and a cobbler). The *precario tenens* and the depositee were liable only for *dolus*, not *custodia*, so that they could not sue; action remained with the *dominus*,

despite the fact that the *precario tenens* had *possessio* and the interdicts. The pledgee was probably regarded as having a positive *interesse* both in classical and in Justinian's law — the *interesse* being obviously the amount of the debt secured. However, there are texts that seem to imply a negative interest in cases other than theft by the pledgor, but it seems better to treat him as having an action only for his interest, the owner being able to sue on the residue.

Where there was a negative *interesse* the *dominus* had no *actio furti* at all : he was safe enough against theft with *custodia* his insurance. Only if the 'custodian' were insolvent and the insurance therefore diminished, could the *dominus* sue directly — a fine example of practicality triumphing over principle. Of course, the general rule meant that the 'custodian' reaped the benefit of the multiple damages whereas the *dominus* got merely the simple value of the *res* ; but the uncertainty of catching a thief and the unlikelihood of his having assets to satisfy even the simple value, let alone a multiple, were such that few owners were likely to be envious of the 'custodian's' rights. As has been seen in respect of *commodatum*, Justinian changed the law relating to that particular contract : whether or not the borrower was insolvent the lender was to have the option of suing him or the thief ; the borrower then had the *actio furti* only if he was himself sued by the lender on the *actio commodati*.

Anyone with a mere right in *personam* without *custodia* had no *actio furti*, but it was, of course, possible that his interest might be such that the owner was under a duty to transfer his *actio furti* by the normal method of *mandatum*. Thus a buyer before transfer might insist upon such transfer (or upon assignment of damages obtained already if the vendor had sued) because risk was upon him and advantages accrued to him. The heir succeeded to the right of action in developed law, but originally he may have been able to sue because he had become owner and his ownership was infringed by a continued *contrectatio*. Finally, in order to sue one's *interesse* had to be *honestum* : a thief or other *mala fide possessor* could not bring the action.

There was a distinction throughout the history of Roman law between *furtum manifestum* and *nec manifestum*. Originally

manifest theft probably covered only the situation where the thief was caught in such circumstances that there was no possible doubt of his guilt, and therefore no need for any trial. By classical times various tests had been propounded to define the distinction: (a) the thief was caught in the act — at the moment he was first handling the *res*; (b) he was caught in the place where he had committed the act, *e.g.* in the same house; (c) he was caught whilst carrying the thing to where he intended to leave it; (d) he was seen carrying it at any time. In the time of Gaius view (b) seems to have been most popular, but view (c) became gradually more prominent thereafter. Justinian adopted it with modifications: the thief had to be caught on the same day and before he deposited it where he had planned to leave it overnight. This variation of (c) would cover all cases of (a) and nearly all cases of (b), domestic theft not being actionable. View (d) had been quite early rejected. Once the stealing expedition was complete *furtum* could only be *nec manifestum*, even if the thief should be found with the *res* upon him.

The importance of the distinction was that under the Twelve Tables the penalty for *furtum manifestum* was capital. A free man, so caught, was scourged and adjudged (*addictus*) by a magistrate to the person wronged — whether as a slave or a judgment debtor is uncertain; a slave was scourged and put to death. No doubt there was from early times a frequent practice of buying off the victim of the theft, and eventually the praetor instead introduced an *actio in factum* for fourfold damages for *furtum manifestum*. For *furtum nec manifestum* the Twelve Tables had provided a penalty of twofold damages, and this remained so, with the *actio furti nec manifesti* being, of course, civil, not praetorian. The persistence of the distinction is puzzling. Presumably, the praetor had to introduce a penalty considerably greater than that for the non-manifest offence in order to induce victims to abandon freely their strong position for composition. Once the higher penalty was brought in, perhaps public opinion, always rather conservative in Rome, came to regard the manifest wrong as being therefore more heinous. Certainly the Roman law of delict rarely showed any strong tendencies towards mitigating rules of the developed law in favour of an intentional wrongdoer. Whatever the reason the difference in penalties was maintained even under

Justinian. Perhaps by then the manifest thief had practically invariably been dealt with under the criminal law: the pick-pocket and the sneak-thief are not likely to be affluent enough to be worth suing.

Formerly there were also four special actions to meet certain cases connected with theft: *furti concepti, oblati, prohibiti* and *non exhibiti*. (a) The first had both thieves and receivers in mind. When, after a search in the presence of witnesses, stolen property was found on a man's premises he was liable to the *actio furti concepti*, by which a penalty of triple value could be obtained under the Twelve Tables. (b) The *actio furti oblati*, also for three times the value, lay where one person placed stolen property on another's premises, so that the property might rather be discovered there than in his own house. The action was in favour of the person upon whom the goods had been 'passed off' against the other, whether the latter were the actual thief or not. (c) The *actio furti prohibiti* was the outcome of a provision of the Twelve Tables which enacted that if a person wished to search a suspect's house, he must do so *lance et licio*, i.e. be naked save for a loincloth and carry a platter in his hands. If anything was so discovered the case was dealt with as *furtum manifestum*. The Twelve Tables apparently did not impose any penalty upon the occupier who prevented another from searching his premises for stolen property. This type of search had died out in the Republic and its relation to that in *furtum conceptum* is quite uncertain. The *actio prohibiti* probably survived the solemn search in order to discourage prevention of any type of search. The origin of the form of the search *lance et licio* is again unknown: it may have had some magic significance or else have been to prevent malicious 'planting' by a false complainant. (d) According to Justinian, under a praetorian *actio furti non exhibiti*, a penalty, probably fourfold, could be obtained from a man who had failed to produce a *res furtiva* which later, after search, was found on his premises. Justinian says these four actions had fallen into disuse in his time; where persons knowingly received and concealed stolen property they were liable to the action for *furtum nec manifestum*.

Besides these various penal actions the plaintiff had also his reipersecutory remedies, which, unlike the penal ones, would be available against the heir of the thief. As well as

the *vindicatio* and possessory interdicts, which the owner would have in any case, he had as an alternative the quasi-contractual *condictio furtiva* (*ante*, p. 386). The *condictio* was the more popular as it did not depend upon the continued existence or control of the *res*, the value being recoverable. Also alternative was the *actio ad exhibendum* which lay against anyone who had possession of the *res* or had fraudulently parted with it: if it was not produced the defendant had to pay the interest which the plaintiff had in not losing the property. Whilst the plaintiff had to choose which of these remedies he would bring he could bring any of the penal actions in addition — the two ideas being here quite separate. At the same time an *actio furti* might lie where a reipersecutory action might not, *e.g.* in favour of a non-owner or against an accomplice who had never had possession of the *res*.

(B) *Rapina*

Originally the fact that a theft was accompanied by violence made no difference to the penalty, but in the troubled times of the last century B.C. the praetor constituted new remedies for violent wrongs. From these remedies developed the *actio vi bonorum raptorum* and the delict *rapina* for robbery. The action was *in factum* and more summary than the remedies for theft, being tried by *recuperatores*. It lay for four times the value, if brought within the year; thereafter for simple value. In classical law the fourfold was probably purely penalty and reipersecutory actions could be brought in addition. Justinian treated the action as '*mixta*', *i.e.* threefold for penalty, simple for compensation. The action did not lie against the heir, even for simple damages: if theft had been accomplished one would have used the *condictio furtiva* or other reipersecutory action. Under Justinian, at least, anyone with an interest in the *res*, even a deposittee in some cases, could sue if violence was shown him. The damages were assessed, it seems, on the value of the *res*, not on the plaintiff's *interesse*. Any violence, even by one unarmed thief, was sufficient. If the robber were caught immediately it might be more profitable to sue out the *actio furti manifesti* since that involved a fourfold penalty and allowed the *condictio* as well. Proceeding for the one must have barred the action for the

other. In *rapina* one could be an accomplice merely by advising or encouraging the act, whereas in theft a plan or physical help was probably needed. Except as stated, the rules of *rapina* were the same as in *furtum*.

The edict also punished wrongs inflicted by armed gangs as well as *rapina*. However, it was robbery that developed into a clear delict. The other cases of loss inflicted, though punished by a fourfold penalty, were not classified along with the civil delicts as *rapina* came to be.

Rapina was also severely punishable criminally under the *lex Iulia de vi*.

As with theft the delict had to be with *dolus*: a mistaken impression that the *res* really belonged to one excluded *rapina*. However, criminal sanctions for violent self-help existed as early as the Republic and Marcus Aurelius decreed that such conduct should result in forfeiture of the claim. A constitution of A.D. 389 provided that neither an owner nor anyone else should use force to take away a *res* or enter upon land. An owner who did so lost his ownership, whilst a non-owner had to restore the *res* and pay its value in addition.

(C) *Damnum Iniuria Datum*

The development of the Roman law in respect of damage to property is one of the most interesting and instructive topics in the whole law. It shows very well the evolution of principles of law upon the basis of remedies granted for acts and events that have happened and under the pressure of various policies. To modern eyes it is a mixture of great achievement and amazing conservatism, and in some respects it bears some remarkable broad resemblances to the empirical development of the English law of tort. Its interest is the greater because it owes so much to the two greatest sources of Roman legal development, the praetor's edict and the interpretation of the jurists.

In early times the Romans like all primitive peoples had laws prohibiting certain pernicious acts. Those of which we know bear striking likenesses to wrongs recognised by other ancient Mediterranean peoples. They reflect the small pastoral and agricultural community. There is no system in the wrongs as far as one can see — certainly none that foretell

the principles to come. Injuries to freemen and to slaves are dealt with together in the Twelve Tables; later the social subjection of the slave caused injury to him to be treated separately along with damage to animals and property. Some wrongs were punished with savage sanctions — retaliation (*talio*) for mayhem, death by burning for arson; some with fixed money penalties that came to be ridiculous with steady inflation. These individual wrongs continued for a long time, rarely being swallowed up in later general principles that amply covered their ground and afforded remedies as good, if not better. Such was Roman conservatism. When delict became a concept, they were capable of being regarded as delicts, if only minor ones. Some of them, particularly those with fixed tariffs, dwindled in their original form but gave rise to praetorian actions *in factum* that thrived in their narrow sphere right to the end. The old *actio de arboribus succis* with its penalty of 25 *asses* engendered the praetorian *actio arborum furtim caesarum* for cutting down trees and shrubs: a development remarkably parallel to that of the delict *iniuria* with its adult devices for achieving compensation and solace from the primitive tariffs for blows in the Twelve Tables. Nor did the facts that the actions did not cover all cases of wrongs in respect of trees and that what they did cover was amply covered by delicts of *furtum* and *damnum iniuria datum* prevent their survival. So it was too with the *actio de pastu* where one man's cattle consumed another's pasture: the old remedy survived alongside the more general ones. In every case the plaintiff had to choose which he would sue out. Whatever the particular reason in each case, a number of these picturesque delicts survived. (Similarly the special *actio de tigno iniuncto* lived on beside the general *actio furti*.)

However, these isolated wrongs could give rise to no more than developments of very particular delicts. Some remedy or remedies for a large enough group of cases had to appear before any development of a general principle of damage could begin. Those remedies came with the *lex Aquilia*, a statute passed in the middle of the Republican period. It was a plebiscite, which meant that, in its final form at least, it could not have been passed before the *lex Hortensia* of 287 B.C. On the other hand it had to be in existence before c. 130 B.C. because the jurist Brutus, living thereabouts,

wrote upon it. The archaic formulation of the chapters, the use of '*aes*' for money, and the tradition that it was passed at the time of a secession suggest that the date of 287 or 286 B.C. is very plausible. Its second chapter shows that it certainly antedated the contract of mandate (*ante*, p. 342). The *lex* may well have been the culmination of a series of legislation: again the second chapter with its remedy against the fraudulent release of a debtor by an *adstipulator* seems to indicate that it appeared first alone with the first chapter; the third chapter, obviously framed with the first in sight, must have been added at a later date or else it would have come second. Whatever the previous history, suffice it that it was the *lex* in this form that was the basis for the delict that was to arise. And very significantly all three chapters have in common besides the wrong of the defendant the enforcement of compensation for loss occasioned to the plaintiff. The term for this loss is *damnum* and that meant some impoverishment of a person. Thus early, the key to the delict was pecuniary loss to the plaintiff — not physical damage to his physical property. The first and the third chapters admittedly were concerned only with loss occasioned by physical damage to property and this type of loss predominated in the delict right to the end. Even so, the Romans from the start had in mind the concept of loss and, although they had but crude methods of assessing that loss, it was that concept which made this part of their law great. '*Damnum iniuria datum*' must be translated as 'loss unlawfully caused' — not as 'damage unlawfully inflicted'.

The first chapter dealt with the killing of slaves and four-footed beasts of pasture (*pecudes*). These latter were such as sheep, cattle, pigs and horses. Later tamed elephants and camels were added to the list: they fitted the definition and were economically as valuable and useful as the original members; there was, therefore, good reason to extend the extra cover of the first chapter to them. (In contrast they were excluded from the list of *res mancipi* because when they came on the scene the rules respecting such movable *res* were so inconvenient that there was no desire for extension.) An action lay on the *lex* for a penalty to the owner to the extent of the highest value that the slave or beast had had in the twelve months before the killing (or the act which later caused

the death, according to the law as later interpreted). There are various possible explanations for this method of calculating loss: there might be a dispute as to what the value was immediately before death — the defendant might allege that the slave or animal had contracted a disease which was not easy to prove after the death, and there was no reason to allow the defendant chances of mitigating what was a penalty as much as compensation; then again seasonal fluctuation in prices (*e.g.* a slave ploughman less useful at certain times of the year) could be best countered by such a rule. In any case, the rule was adopted and remained throughout the law. From starting as a rough means of calculating damages it became really penal in some cases. Thus if *X*'s slave had been a skilled painter, but had lost his thumb within the year before *Y* killed him, *X* could recover from *Y* the value of the slave as it had been when he was a painter.

The third chapter dealt with cases of other damage to property. The original text is uncertain — it may have dealt with destruction of things other than slaves and *pecudes* or just with injuries less than death to slaves and *pecudes*. There are doubts too as to the original method of assessing the damages: it may well have involved a rule that such loss as appeared to flow from the act within thirty days next after it should be compensated. However, before the classical period it became settled by interpretation that the basis of calculation should be similar to that used under the first chapter — the highest value of the *res* in the last thirty days. It is to be presumed that the measure of damages was simply the difference between such highest value and the value of the *res* impaired after injury.

The actions on the *lex* were for direct acts — killing (*occidere*) in the first chapter, burning, breaking or bursting (*urere, frangere, rumpere*) in the third. For *occidere* there had to be some direct physical injury resulting in death: this might be a blow with a sword, a shot with an arrow or an injection with a drug. On the other hand, an indirect act was only *mortis causam praestare* (furnishing the cause of death): making a horse shy so that a slave falls off and over a cliff, giving the victim a poisoned drink for him to take, or inducing a slave to climb a tree with the result that he falls to his death. For this type of *damnum* the praetor provided an *actio utilis* —

probably *in factum concepta*, but on the analogy of the statute: whether it had the full penal consequences of the direct action is uncertain, but not improbable. The line of distinction was not always clearly drawn: if *A* pushed a slave over a bridge, whether he died from the fall, from drowning or from exhaustion in his efforts to save himself, the action was direct; if *B* pushed *C* so that he fell on a small slave boy and killed him, the action was indirect and *in factum* — whereas if *B* had crushed the boy by pushing a boulder on to him, the action would have been direct. Apparently the presence of a human being, even in a non-willing state, as the actual instrument of killing was held to break the causal link, just as where *D* gave a sword to a madman who then slew another.

Under the third chapter development was similar in part. First, however, the scope of the three words had to be settled. Early juristic interpretation led to the construction of '*rumpere*' as '*corrumpere*', which meant any act directly deteriorating the *res* in question — e.g. tearing, soiling, rendering useless by inseparably mixing it with another commodity. However, as with *occidere*, the act had to be direct, and also the object itself had to be harmed. This may be summed up in the time-honoured expression: *corpore corpori*, i.e. by the defendant's physical intervention and with physical injury to the *res*. Any *damnum* not complying with these requisites could be remedied, if at all, only by praetorian action. The praetor, under both chapters, granted his analogous actions not upon any general principle enunciated in the edict, but upon the facts of the individual case. It therefore greatly exercised the minds of the classical jurists to assign various actual events or stock examples to the spheres of the direct and of the praetorian actions. Thus, inciting an unleashed dog to bite a slave is indirect, whilst holding the animal as it bites gives the direct action. The extension of liability for damage *non corpore* is similar to that under *occidere*: it is more interesting to note the extension to cover *damnum* inflicted without damage *corpori*. Thus, sowing weeds among a farmer's corn causes him loss in the expense of clearing the field rather than in actual harm to the crop; loosing a caged animal or a chained slave similarly causes loss without harm to the *res* itself. These extensions of actions *in factum* may owe as much to the *actio doli*, by which the praetor remedied wilful acts of this nature,

as to the *lex Aquilia*. It is noticeable, however, that there is no case where the *actio in factum* lies except when a physical *res* is involved and the loss is in fairly close relation to that *res*. Independent pecuniary loss caused by negligence does not seem to have been remedied even in Byzantine law, even though the *actio doli* may have come to cover such cases where there was an intentional act — *e.g.* by a false statement inducing conduct resulting in loss.

These extensions by the praetor and the jurists in respect of acts causing loss seem to have been motivated more by desire to compensate the plaintiff than to penalise the defendant for his wrong — although there was no great lessening in delictual consequences as far as can be seen. A similar tendency to concentrate upon compensation is to be found in treatment of the measure of damages. The notion of the highest value came to be adapted to include also certain consequential losses due to the defendant's act. Thus, *A*'s slave may have been appointed heir in *B*'s will but been killed by *C* before he could make *aditio* for *A*. In such a case the value of the *hereditas* was included in damages due. Medical expenses necessarily incurred upon an injured (or even dead) slave or animal could also be recovered — they and temporary loss of earnings, would, of course, be the only damages if the slave or animal were restored to full health. Depreciation in value of other property of the plaintiff's may also be taken account of; *e.g.* where one of two circus artists is killed (or maimed) and as a pair they might have been sold for 1000 *ss*, but each individually was worth only 300 *ss*, the damages will be 700 *ss*. Again, if *X*'s *pecus* has damaged *Y*'s property, *X* may either pay the damages or hand over the *pecus* (at least under Justinian); so, if *Z* kills the *pecus* before *Y* sues, *X*'s *interesse* in the *pecus* is equal to his liability to *Y* if that is greater than the price obtainable for the *pecus*. This development of *interesse* from highest market price is usually summed up in the terms *lucrum cessans* (loss of profit, *e.g.* the *hereditas* or loss of earnings) and *damnum emergens* (consequential expense or loss, *e.g.* medical expenses, depreciation of another slave). Roman law, however, stopped short at sentimental damages, perhaps a little illogically. Because a man who had his natural son as a slave could not recover as damages for his death the sum he would have paid for the slave in the

market, a slave-dealer, who had hoped to sell a natural son to the father, would also get only the market price. Moreover, speculative damages were also irrecoverable: there was no compensation for loss of fish where a ship negligently fouled a trawler's nets.

Damnum had to be caused by the defendant's conduct. There is no case of liability for omission without a prior assumption of responsibility. A man who rode a horse without the strength or skill to control it was liable for any damage caused if the animal got out of control; a doctor who abandoned after-care of a slave after a successful operation was similarly liable; so was a man who went to sleep when he was looking after a fire.

There was no liability if there was no *damnum*, even if the *res* was damaged. A slave given a black eye might need no treatment and might not suffer in value or be unable to work. A slave boy castrated would, in fact, be worth more in the market. In such cases action might be available on the delict of *iniuria*, but only if the wrong were intentional.

Besides *damnum* there had to be *iniuria*. As a delict the liability was for fault. In every case there had to be intent (*dolus*) or negligence (*culpa*). The idea probably began without investigation of mental elements. Did the defendant act wrongfully, *i.e.* other than rightfully? So, in some cases, an intentional act was justified: a husband who killed a slave taken in adultery with the wife, a man who killed an armed robber or a thief at night, an official who had to use force to make an arrest, were all not liable. In the classical period, it seems, they looked at the facts of the case, made up their minds whether the defendant caused the loss, and more or less decided the question of *iniuria* as an incident of causation. The man who threw a javelin in a practice ground or lopped branches off a tree where no one had any business to be passing was not responsible for any loss inflicted. But be he at all to blame he could not escape liability — he had not acted rightfully. In post-classical times there was more discussion of negligence, and so the classical notion was put differently: the slightest negligence was sufficient to found liability. If the plaintiff was also to blame the question was one of causation rather than contributory negligence. Liability would be excluded by 'fault of the plaintiff', *e.g.* if a slave walked where

javelins were being thrown or had himself shaved in a spot where the barber's arm might be jerked. However, an intentional (or reckless?) act would found liability despite such negligence, *e.g.* where one threw a javelin to scare the slave into hurrying. There was no question of apportioning blame and loss as in modern English law.

Other extensions were made to the statute. Both chapters gave the action to the *erūs* (*dominus*), so that, unlike the position in *furtum*, anyone else with an *interesse* in the *res* had no direct action. The praetor, however, gave an *actio fictitia* to a peregrine owner, and a usufructuary and a pledgee had *actiones utiles* apparently to the extent of their *interesse* in proportion to the relevant highest value. Persons with rights merely *in personam* — except possibly *coloni* for crops — had no action: *custodia* probably never complicated matters as it did in *furtum*. We have no knowledge of any action for loss where there had been a *ius retentionis*, but one may have been available.

The actions lay for loss in respect of any *res corporalis*, including land, at least in the developed law. However, probably on analogy with slaves, a *paterfamilias* was allowed an action, almost certainly *utilis*, for injuries to his *filiusfamilias* to the extent of medical expenses and loss of earnings. The Digest also allows a *utilis actio* for injuries to any freeman for such damages, but this is almost certainly a post-classical extension. There was never any action under this delict for the death of a freeman, whether *sui* or *alieni iuris*.

Anyone capable of *dolus* or *culpa* could be liable. In the case of a slave or *filius* there was noxal liability. If more than one caused the loss they were all liable *in solidum*, and each could be made to make full payment. However, where a gang of slaves belonging to one master committed the delict, the master need pay only the once, but if he chose to make noxal surrender instead he had to hand over all the delinquents. Accomplices *ope consilio* were liable just as actual participants. Independent wrongdoers (*i.e.* without being in concert) were each liable for the full loss if it could not be proved who was responsible for any part of it; *e.g.* if both *A* and *B* independently struck *C*'s slave so that he died, both would be liable for killing if it could not be shown which struck the fatal blow. An agent would be liable along with his master, or principal unless he could show that he was under a duty

to obey and the order was not manifestly wrong. Whereas an heir could always sue for loss to the deceased's property, the wrongdoer's heir could only be sued to the extent of any gain attributable to the wrong; e.g. if *X*'s slave, named heir in *Y*'s will, was before *aditio* killed by *Z*, named substitute heir in the will; or if *A*'s *res* becomes more valuable as a result of his destruction of *B*'s similar rare object. Although the action was definitely penal, it was sufficiently compensatory (*mixta*, according to Justinian) for it to lie between husband and wife. However, in this case the general rule imposing liability for double the *damnum* against a defendant who denied responsibility did not apply.

The intentional killing of a slave not only gave rise to the delict under the *lex Aquilia*, it was also a crime under the *lex Cornelia*; the two proceedings were quite independent of each other and either could be used first without prejudice to the other. It seems clear that *furtum* and *damnum iniuria datum* were mutually exclusive as regards the act of loss, but a thief could, of course, be liable for damaging the *res* as well as for taking it. *Iniuria*, however, might exist with its action for intentional insult for the same act as the Aquilian delict. An action on the *lex* might also co-exist with a contractual remedy — e.g. where the surgeon negligently operated. In most cases there was no restriction on bringing either or both actions, but the plaintiff could recover for the same *interesse* no more in damages than he was entitled to under the most favourable action. It was possible for Aquilian liability to be reduced by a term in a contract, but a term excluding liability for *dolus* was always void.

(D) *Iniuria*

Justinian says that the term *iniuria* has several meanings —

- (i) Any illegal act.
- (ii) The wrong done by a judge who pronounces an unjust sentence.
- (iii) An act implying *dolus* or *culpa*, as under the *lex Aquilia*.
- (iv) An insulting act, one that is primarily injurious to a man's dignity.

It is in the last sense that the word is used as denoting the delict *iniuria*. *Iniuria*, as a specific wrong, was, in fact, any wilful violation of the right of a freeman to safety and

reputation. The possible wrongs covered were very wide, for *iniuria* included not merely assault, but also defamation which, with us, are separate wrongs. The essence of the delict appears to be a contemptuous disregard of another's dignity tending to cause loss of repute and deliberately intended to produce that result. The following examples of *iniuria* are found in the Institutes: wounding or beating with the fist or a club; taking a man's goods in execution for a debt which does not exist, thus suggesting that he is insolvent; composing or publishing defamatory writing or verses; following a woman of honest character or a young person (so as to imply that they are persons of frail character); and an attempt upon chastity. In this last case the action lay even though the motive was unmixedly amorous without desire to insult. As in the English tort, truth was a defence in defamation. However, unlike English civil law, the *iniuria* needed no publication to be actionable: the insult could be to the plaintiff alone, because the essence of the wrong was the assault on feelings and loss of reputation was just an incidental, though important, item.

The action could be brought by several persons in respect of the same act. *A* insults *B*, who is the wife of *C* and the *filiafamilias* of *D*. All three might bring the action: *B* because the action was one of the few actions which persons in *potestas* could bring in their own names; *C* because, though *B* is not *in manu*, an intention to insult him is presumed; and *D* because he has been insulted in the person of someone in his power. Had *C* been in *potestas*, his *paterfamilias* might also have had a right of action. There were, however, no presumptions the other way: if *C* were personally insulted, *B* could only sue if she could show a definite intent in *A* to insult her in the act. The same was true in respect of anyone in power where the *paterfamilias* was insulted. A slave could never bring the *actio iniuriarum*, and his master only when the act was of so grave a character as to show that an insult to the master was intended, as where one man flogged or tortured another's slave. But if the *iniuria* diminished the value of the slave the master could, of course, sue under the *lex Aquilia*. If the slave was held in common, the injury was estimated not in accordance with the shares of the masters, but with regard to their respective positions. Where a slave was held in usufruct, the insult was presumed to be intended for the

dominus, not the *usufructuarius*; but the presumption might be rebutted if the latter could show that the wrong had, in fact, been aimed at him. Where the *iniuria* was due to a *bona fide serviens* the supposed master had no action unless he could prove that there was intent to insult him, but, in any case, the *bona fide serviens* could sue in his own name. In the case of insult to a corpse or funeral, the insult was to the heir, if he had already entered, if not, to the *hereditas*, and so was acquired by the heir after entry.

The delict was developed gradually by the praetor from crude 'tariff' rules for assaults. The remedies given by the Twelve Tables were: for maimed limbs, retaliation; for broken bones, a penalty of 300 *asses*, if the person injured was a freeman, 150 if a slave; for other injuries, 25 *asses*. It followed that the grossest insult could be atoned for by a payment of 25 *asses* under the Twelve Tables. This sum had become derisory as a deterrent owing to the change in the value of money, and there is a story of one L. Veratius whose recreation took the form of walking about the streets and striking people in the face; he was followed by a slave with a tray full of *asses*, which he distributed among his master's victims according to the law of the Twelve Tables. The praetor accordingly introduced the *actio iniuriarum*, under which the plaintiff was allowed to fix his own damages, the judge having power to reduce them if he thought them excessive, by virtue of the *condemnatio* clause which instructed him to condemn for what should seem fair and just (*bonum et aequum*). This continued to be the practice in the time of Justinian, the damages being calculated after considering the nature of the *iniuria*, the character of the person injured and the surrounding circumstances generally. In particular, the damages might be greatly augmented if the wrong amounted to that species of *iniuria* which was known as *atrox*. In the case of *atrox iniuria* it normally happened that the praetor indirectly decided the amount of the penalty when he fixed the bail (*vadimonium*); for the plaintiff would take this as the sum to claim, and the *iudex*, though not bound to allow the full amount, would do so in deference to the praetor.

An insult might be *atrox* —

(1) *Ex facto* (or *ex re*), by reason of the nature of the act, as where a man was beaten with clubs.

(2) *Ex loco vulneris*, because of the part of the body injured, e.g. the eye. But this was really no more than a form of *atrocitas ex re*, but raised to a separate heading by Justinian — probably to make the classification fourfold.

(3) *Ex loco*, by reason of the place where the injury was done, as in the forum or a theatre.

(4) *Ex persona*, by reason of the dignity of the person subjected to the injury; e.g. when a magistrate or senator was attacked.

The *actio iniuriarum* lay against not only principals but accessories to the act, all for the full amount. It did not pass to or against the heirs of either party. It was barred by *dis-simulatio*, i.e. a man who failed to show immediate resentment was taken to acquiesce in the wrong done him and could not afterwards bring the action. The *actio iniuriarum* was *in factum*, involved *infamia* and had to be brought within a year.

Finally, in most cases of *iniuria* the person wronged could elect between the civil action and a criminal prosecution; e.g. under the *lex Cornelia* (c. 81 B.C.), and under this law a distinct civil remedy came to be developed (in addition to the praetorian *actio iniuriarum*) for cases where one was beaten or struck or one's house was broken into. This action was not barred in a year.

(E) Other Delicts

Besides these four delicts of the Institutes there were a host of other liabilities giving rise to delictual remedies — especially as a consequence of praetorian intervention. Interesting examples are proceedings in respect of the fraudulent transfer or abandonment of property by a debtor or by a *libertus* to the detriment of creditors who obtained *missio in possessionem* and of *patroni* respectively: in each case the remedies would be normally against third parties, often innocent, gaining from the fraud, and thus they tended to be quasi-contractual, with enrichment and compensation in view, rather than penal.

Three other important praetorian delicts were as follows —

(1) *Dolus*. This consisted in wilful conduct in the nature of fraud or trickery with a view to deriving some unfair advantage over another. Where it induced another to act to his detriment there might be a *restitutio in integrum*; such a grant

barred any *actio doli* (or *de dolo*). The same was true where an *exceptio doli* was the appropriate remedy, *e.g.* where *A* had been induced by *B* to enter into a liability towards *B* and that liability was still unfulfilled. The *actio* was penal for simple damages, available to, but not against, the *heres*, but being praetorian it had to be brought within the year (*annus utilis*). It lay to make good the damage, but only against the wrong-doer, and only in the absence of any other remedy as it involved *infamia*. It was *arbitraria*, which meant that when restitution or satisfaction was made liability ceased; so, whilst several parties to a fraud might each be liable *in solidum*, they would all be released by one satisfaction (in contrast with, *e.g.*, the *lex Aquilia*, where the action was not *arbitraria*). Where the *actio doli* was time-barred or not available (*e.g.* because the parties could not bring 'infaming' actions), an *actio in factum* could be brought instead to the extent of enrichment — and this was possible against the heir. *Dolus* as a distinct delict must not be confused with *dolus* as a ground of liability in certain delicts, where it means wilful intent, as in the action on *iniuria*.

(2) *Metus*. Where a person under duress had entered into some legal transaction to his detriment, then if that transaction had not been completed, *e.g.* a contract to sell a slave, and an action were brought to enforce it, an *exceptio metus* was available. If the transaction had been carried out, *e.g.* the slave had been handed over, a *restitutio in integrum* could be sought. Failing restoration, the *actio quod metus causa* could be brought for fourfold damages against the wrong-doer or, probably only post-classically, against anybody else who had profited by the transaction, but in the latter case only for the actual profit: as in the *actio doli* there could be no condemnation where there was restoration. The duress must consist in threats of death or of grave bodily injury, of enslavement, of an attack on chastity or of a capital charge against the plaintiff or the members of his family. In other respects it resembled the *actio doli*, being *annua*, available to, but not against, the *heres*, except that it did not involve *infamia* and was available even if there was another remedy. After the year a plaintiff who had no remedy was allowed an action for simple damages if the praetor allowed (*causa cognita*).

(3) *Servi corruptio*. A person who wilfully brought about

the deterioration of a slave, whether in respect of his body, mind, or character, was liable to an *actio servi corrupti*, which, unlike the above two, was noxal and perpetual, but like them, being penal, was available to, but not against, the *heres*. The action was for double damages assessed on the basis of any lessening in value of the slave and any damage or loss inflicted or liability incurred by him. Where the facts could ground an action for *damnum iniuria datum*, the remedies were alternative. Justinian allowed even an unsuccessful attempt to corrupt a slave to found the action.

VI

Quasi-Delict

Justinian seems to have created this class of obligation in order to round off his fourfold classification of obligations in the Institutes. Moreover, he manages also to put four species of quasi-delict within the category. The exact basis for choosing these four cases from the large number of minor delictual obligations is thoroughly obscure and much disputed. Perhaps the most popular suggestion is that they all contain — or can be made to seem to contain — an element of vicarious liability. Another theory is that all the cases began — and most continued — as instances of strict liability, *i.e.* liability without *dolus* or *culpa*. As will be seen the first of the four cases causes the major difficulties for both theories.

(1) *Iudex qui litem suam fecerit*. A judge could be sued for damages (the amount to be decided by the judge at the subsequent trial) if the former 'made the cause his own', *i.e.* gave an unjust sentence by negligence or bad faith, or perhaps failed to appear on the day appointed for judgment. It has been suggested that this is vicarious in that the *iudex* takes over the liability of the party benefited by his impropriety: 'making the cause his own' is said to imply this. However, it is difficult to accept such a view — the texts all talk of his having erred himself (*peccasse*). The other view also encounters trouble. Under Justinian liability was certainly for fault, if only negligence (*per imprudentiam*). If liability was strict in classical times, as is feasible but incapable of proof, then the

change to fault liability must have occurred at a date later than the inauguration of the class of quasi-delicts. Whilst such a view is very speculative it is also attractive ; in any case no theory yet advanced can really absolve Justinian's compilers from blame for either artificiality or anachronism in their pursuit of the fourfold.

(2) *Actio de effusis vel deiectis*. Under this praetorian action the occupier of a house abutting on a highway could be rendered liable for anything thrown or poured out from the house to the injury of another, though the act had been done without that occupier's knowledge or consent. The action was for double the amount of the loss caused, and if a freeman had been killed there was a penalty of fifty *aurei* ; if, however, the freeman was not killed, but merely hurt, the judge assessed the damages, taking into account medical expenses and loss of employment. The action, if a freeman had been killed, was *popularis*, i.e. could be brought by a common informer, but preference was given to relatives of the person killed.

(3) The *actio de positis vel suspensis*, also of praetorian origin, lay against a person who kept something placed or suspended from his house over a public way, which could injure a passer-by if it fell. The action was *popularis*, the penalty being ten *aurei*. This was, of course, within the same policy as the last, and both were noxal in respect of slaves. However, in respect of sons living apart from their fathers, only the sons were liable, not the fathers. The same was true in respect of a *filius* who committed the first quasi-delict.

(4) The owner of a ship, or an inn, or a public stable was liable on a praetorian action for double the loss occasioned to a customer on the premises by the theft or *damnum iniuria datum* of anyone in his service. In the case of an inn the liability was also for the acts of permanent residents as well as servants, but not for those of casual callers. The exact relation of this group of liabilities to the contractual ones under the *receptum* is uncertain, but they were probably alternative. Under the quasi-delict the plaintiff would have to prove the theft or loss to have been caused by one for whom the defendant was responsible ; whereas the contract acted as an insurance for the plaintiff, whoever did the act.

None of these actions lay against the *heres*, and they were all penal. Their separate treatment may be perhaps explicable

by virtue of the idea of '*maleficium*', a word usually synonymous with '*delictum*'. The last three cases are not based on any wrong — *maleficium* — of the defendant himself, despite talk of *culpa* in choosing servants, for there liability existed whether there was such *culpa* or not. The liability is, therefore, *quasi ex maleficio*. Perhaps, the Romans baulked at the idea of calling a judgment, even one corruptly given, a *maleficium* (even though they could call it an *iniuria* in the sense of an injustice). So it could be that the judge's case was the first liability to be described as '*non proprie ex maleficio*' but '*quasi ex maleficio*'. Later the terminology could have been adopted for penal liability without *culpa*.

VII

Noxal Liability

Originally anyone in *potestas*, whether slave or free, had to be given up by the *paterfamilias* to the victim of a wrong (*nox*) and the latter no doubt had absolute freedom in what he did to the surrendered wrongdoer. The *paterfamilias* would usually seek to compound, but it would be open for the victim to extract a heavy composition for releasing his right to the delinquent's person. However, even by the time of the Twelve Tables a change had come about. A third person injured by another's son or slave had no longer the right to demand that the wrongdoer should be given up: his right was limited to an action claiming that the superior should either pay the damages that an independent wrongdoer would have to pay or surrender the offender. In the time of Gaius noxal surrender existed in the case of slaves and *filiifamiliarum*, but not *filiae*; and it was presumably applicable to persons *in mancipii causa*. The status of *in mancipii causa* had long been obsolete in Justinian's time and the noxal surrender of sons had fallen wholly into disuse. A noxal action, therefore, still applied only in the case of slaves, and a slave so surrendered, if he could work off sufficient money to compensate for all the damage he had caused, could apparently compel his new master to free him. The elimination of surrender of *filiae-familiarum* — and those *in manu*, if *noxae deditio* ever indeed

applied to them — was very early on grounds of morality: the disappearance of noxal actions against *filii* was gradual and probably commensurate with the growth of his rights to independent *peculia* and *bona*.

Noxal actions were established either by statute or by the praetor. By statute in the case of theft (*viz.* by the Twelve Tables) and *damnum iniuria datum* (*lex Aquilia*); by the praetor in the case of *iniuria*, *vi bona rapt*a and other praetorian wrongs. It had no real application to contract or quasi-contract, and in quasi-delict noxal surrender of a slave might occur in the unlikely event of his being the householder at the time, but in other cases the slave would normally be noxally surrendered for his own act which would be a delict — e.g. *damnum iniuria datum* for things thrown from a window, *furtum* in an inn or ship — and this would purge the quasi-delict as well as the delict. Where the slave's act raised a liability in contract as well as to a penal action (e.g. the *receptum* and the quasi-delict in respect of innkeepers) the master could meet the contractual action by surrender of the slave.

If the master or *pater* connived in the wrong or ordered it, he would be liable in full himself — on the direct action in the case of the *lex Aquilia*. It would normally be more advantageous to sue him in this way, even though the noxal action was an alternative, because one could be sure of achieving the full penalty. However, the noxal action survived and a manumitted slave or a son later *sui iuris* might find himself liable unless he could show that he was ordered and the act was not clearly seriously wrong. The master's personal liability existed not only where he was a party to the wrong but also where he knew of its impending commission but failed to forbid or prevent it when he could. This personal liability remained with the master even when the slave had been manumitted or transferred.

A noxal action lay only where there was *potestas* and always followed the person of the wrongdoer. *Noxa caput sequitur*. If, therefore, *A*'s slave, *X*, wronged *B*, *B* could sue *A* only so long as *A* owned *X*; if *X* was sold to *C*, in the absence of fraud, the action lay no longer against *A*, but against *C*. So where a master had connived in a slave's wrong and then died, the heir would not be liable *in solidum* because the penal action had died with the testator, but he would be

liable noxally for the slave since he had now inherited him. Death of the delinquent before *litis contestatio* extinguished the liability; death thereafter may have left the master with the option of handing over the body instead of paying full damages, even as late as the time of Gaius, but certainly in Justinian's time the effect was to make the master liable *in solidum*. If the slave was manumitted, there was no possibility of a noxal action, but he could be sued personally by a direct action. Conversely, a direct action might become noxal, as where *X*, a free man *sui iuris*, wronged *B*, and afterwards passed into *C*'s *potestas* by adrogation or became *C*'s slave. *B*'s direct action against *X* became converted into a noxal action against *C*.

The usual procedure when the master did not propose to defend was to produce the man *in iure*, and the praetor would authorise the plaintiff to take him away. If the master neither surrendered nor defended he became fully liable for the loss and could not afterwards evade liability by surrender. The *formula* stated the liability as being either to pay or to surrender both in the *intentio* and in the *condemnatio*. This meant that a master could still surrender even after judgment.

If several slaves were jointly concerned, logically all ought to be surrendered, but the praetor mitigated the hardship by fixing the damages as if only one slave were concerned. This virtually meant the master would be liable *in solidum* as for one slave; for if he wished to make surrender he had to hand over *all* the slaves. If one slave had committed several distinct delicts against various persons, the first plaintiff to gain judgment was entitled to take surrender, and if such surrender was made the other plaintiffs were left remediless, even against the new comer, the first plaintiff.

A wrong done by *A*, a slave, to *B*, his own master, had no legal effect, because there could not be a civil obligation between a man and a person in his *potestas*. On the same principle, if *A*, who is *B*'s slave, wronged *C* and was then bought by *C*, *C*'s action became extinguished by merger (*confusio*), although there had been a Proculian view that the liability was merely in suspense.

There were several complications in the law, with variations from one delict to another. Thus in *iniuria* the slave could be given up merely for the purpose of being thrashed

by the victim to an extent determined by a *iudex*, but if the master did not take this line, then upon *condemnatio* full noxal liability applied and he would lose the slave completely by surrender. Under the *lex Aquilia* the liability seems to have depended on *dominium* rather than on *de facto potestas*; thus, unlike the case in other delicts, a master was liable for a fugitive slave's delicts and for those of a slave held by a *bona fide possessor* (who would be noxally liable for, e.g., the slave's thefts).

VIII

Liability for Animals

Where an animal — whether owned by the defendant or not — caused loss because of someone's *dolus* or *culpa*, then an action lay in respect of the appropriate delict — e.g. *iniuria* or *lex Aquilia*. Moreover, there existed the Twelve Tables liability for the *pecudes* that strayed on to another's land and consumed his pasture (*actio de pastu*). But besides these cases there existed two distinct, and often puzzling, heads of strict liability: one civil, with praetorian extensions — the *actio de pauperie*; the other purely *honoraria* under the Edict of the Aediles.

The *actio de pauperie* rested upon the Twelve Tables and was confined to quadrupeds (probably *pecudes* originally), but an *actio utilis* was given later in the case of other animals. It was noxal in that the animal could be surrendered in lieu of damages and that death of the beast before *litis contestatio* freed the owner, but thereafter liability was to pay, there never having been any right, it seems, to deliver the carcase. The implications of *noxia caput sequitur* also applied. Under Justinian, liability was confined to damage done by domestic (*quaere*, tame) beasts, but it is disputed whether in classical law it also applied to wild animals. There was also a requirement that the act had to be *contra naturam sui generis*, but whether this was also classical and quite what it implied is also greatly argued. The action was for simple damages, but penal; e.g. the *heres* could not be sued as heir, only as new *dominus* by virtue of the *noxia*. If a *res* were harmed, anyone with an interest in it could sue; if a freeman were injured, medical expenses and loss of earnings would be recoverable.

The aedilician liability is also the centre of much controversy. The edict was aimed at persons who kept dogs, boars (domestic or wild), wolves, bears, leopards or lions on or near, though this is disputed, a public highway. If one of these animals caused damage or injury, there was liability for double the loss caused or, if a freeman was injured, the *iudex* was free to assess the damages. There was a penal action for 200 *solidi* when a freeman was killed. The liability may have been extended to cases of other animals known to be dangerous. Probably the action lay where the animal had escaped, even though *dominium* of a wild animal was lost on escape. The action was not noxal and where it coincided with liability for *pauperies* both actions could be brought.

IX

Transfer and Discharge of Delictual Obligations

Both Gaius and Justinian deal with transfer and discharge of obligations at the end of contract (and quasi-contract) and have nothing to say at the end of delict. As has been already suggested, this is probably because contract is the essential *obligatio* to the Romans, delict being admitted to the classification later and never being made quite at home there. Moreover, most of the difficulties and cases would be to do with contract and the rules in respect of delict will be seen not to differ very much except in one or two particulars.

(A) Transfer

What has been said already with regard to the transfer of the rights and liabilities of a contract is, for the most part, applicable here also. The wrong-doer could never escape liability by attempting to assign his obligation to another, while a capital penalty (e.g. for *furtum manifestum*) could, obviously, not be assigned, even with the consent of the person wronged. In cases, however, where a delict had conferred upon the injured person a right to receive some definite money payment, he might, if he wished, allow the debtor to

substitute some other person who promised to make payment and then take a stipulation from him ; whereupon the liability of the wrong-doer would be extinguished and transferred by novation. Conversely, the right to receive a money payment for a wrong might be transferred by the person wronged to another in the same way and subject to the same limitations as in the case of the transfer of the benefit under a contract.

(B) Discharge

The description of the methods of discharging a contract applies also, to some extent, to the extinction of obligations arising out of a wrong. Discharge by pardon may, however, be regarded as a method of discharge peculiar to delict, while, on the other hand, there could be no question of the obligation being extinguished by *contrarius actus*, by subsequent impossibility or by *capitis deminutio*. It may be said, therefore, that an obligation arising *ex delicto* ended by pardon, performance, novation, operation of law, death and *ope exceptionis*.

(1) Pardon. In the case of an obligation arising from *iniuria*, a pardon might be implied by *dissimulatio*. In other cases it had to be express, though a mere *pactum de non petendo* was enough. Such a pact was effective at civil law as a bar to a later action, at least in the case of some delicts (early ones like *membrum ruptum* and *furtum*). It may not have been effective at civil law in the case of, e.g., the *lex Aquilia*, but in such cases the praetor would achieve a similar result by granting an *exceptio*. A formal pardon would be effected by novating the obligation by a stipulation and then releasing it by *acceptilatio*.

(2) Performance, *i.e.* payment of the penalty or of the penalty and compensation, and

(3) Novation seem to be methods of dissolving obligation common both to those springing from agreement and from wrong.

(4) By operation of law (a) by *litis contestatio* in the time of Gaius ; (b) by lapse of time, and this far more easily than in the case of contractual obligations ; the *actio iniuriarum*, e.g., was barred if not brought within a year, as were praetorian actions for delict ; but the *actio furti* was perpetual, being a civil law action, and the *actio vi bonorum raptorum*, though

barred by a year in respect of the fourfold penalty, survived after that period for single damages ; (c) merger (*confusio*).

(5) Death had a much wider effect in extinguishing obligation from wrong. Gaius states that one of the most settled rules of law was that penal actions springing from delict were not granted against the heir of the person who committed the delict ; but a rule was introduced about the beginning of the Empire that the estate of the wrong-doer could be made liable so far as enriched by the delict ; and the *condictio furtiva*, not being an action for a penalty, could, in any case, be brought against the heirs of the thief. On the other hand, a delictual obligation affecting property was not extinguished by the death of the person injured, for his heir could bring an action, unless the delict in question were *iniuria* where property was not concerned. As already seen, death of the perpetrator, but not of the defendant, ended noxal liability.

(6) *Ope exceptionis*. An example would be the *exceptio pacti de non petendo* in cases where a *pactum* was not a civil law bar or where the *pactum* was only conditional (e.g. if a certain form of reparation should be made) or temporary.

PART SIX

THE LAW OF ACTIONS

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THE term *actio* originally meant a proceeding or act, recognised by custom, later by the *ius civile*, whereby a claimant could enforce against another a claim which was established by custom or later by *lex*. Originally it would be purely self-help, but self-help is dangerous in a community, being frequently abused or exceeded either fraudulently or out of misguided indignation. It is the first sign of law in society when it becomes recognised that to avoid retaliations and to stand 'clean' before the community a claimant must follow set procedures in enforcing self-help. The elaborate and prolonged nature of these procedures is a consequence of a further trend to enable blood to cool, truth to be discovered and compromises to be made. It is at this stage that resort is encouraged to some independent person or body for a decision whether the claim is in fact justified. Thereafter the whole force of legal development is away from self-help towards settlement by an official of the law or by someone approved by it.

So it was with the Roman *actio*. As it became normal to submit matters to the court the word began to take on the special meaning of a proceeding involving a trial, but the old meaning still survived as well and the recognised forms of self-help were still *actiones*. Moreover, the term *actio* was still a word appropriate only to civil law proceedings. Other terminology (particularly *iudicium*) had to be applied to the remedies introduced by the praetors, peregrine and then urban. When the *formula* began to replace the original actions, the *actio* came naturally to be used to describe those formulary actions that replaced the older forms; and the latter for distinction's sake were termed *legis actiones*, showing clearly their association with the *ius civile*. The purely praetorian remedies continued to be otherwise designated, just as praetorian obligations took a very long time to achieve the 'sacred' civil law

name of *obligatio*. It is perhaps only in the classical period that it was becoming common to call the praetorian *iudicia actiones*.

By this time the third and last procedure, the *cognitio extra ordinem*, had appeared. Just as *actio* took so long to be extended to the praetorian actions, so not only *actio* but probably *iudicium* also could not be used to describe a claim under the *cognitio*: *persecutio* was a frequent term for it. Of course, lawyers, among them Gaius, would tend to be loose in their terms when new institutions had become established and similarities were clear between them and the older ones. In post-classical times, if not before, the terminology was very loose, especially when the *formula* had died and the *cognitio* now alone existed. *Actio* was now used to designate any remedy involving a trial, including *cognitio* and the non-formulary praetorian interdicts. In addition, there was a tendency to use *actio* in a more abstracted sense: not just the form of proceeding, but the right on which it was based. This probably arose from the long established and natural usage whereby *actio* was the term specifically used to describe the remedy arising from a particular liability; e.g. *actio furti*, *actio commodati* — a usage going back to *legis actio* days. It was only natural to talk of 'having an action' or of an 'action lying' or 'running'. The usage became general perhaps only in post-classical times, but allied to it was a quite early tendency to discuss certain grounds for actions, particularly praetorian actions, when treating of actions generally. This was especially so where there had been no discussion in the parts on substantive law, e.g. because obligations were held not to include praetorian liabilities. The practice of describing the particular remedies as *actiones* probably also contributed to the abandonment of sharp distinctions between *actiones* proper and praetorian *iudicia*.

Under the law of actions the Romans were primarily concerned to classify the types of action and to state briefly some of the consequences of the divisions. At the same time, besides the occasional intrusion of a discussion of the grounds of an action, there would be a natural inclination to sketch in some of the rules and effects of legal procedure. Basically this section of their institutional works is devoted to the exposition of the various kinds of remedies that lie for the enforcement of rights set out in the central portion of the

work, the law of *res*; just as the law of persons is a treatment of the types of person that occur and may appear in that central part. However, the function spreads to cover much of the law of procedure.

I

The Three Procedures

(A) *Legis Actiones*

Most of what is known of this procedure comes from the incidental treatment of it by Gaius in his exposition of actions. One must be grateful to his interest in historical material, for the topic was of little practical importance in his day.

The *legis actiones* were the procedures that began in the age of self-help and continued whilst the community was establishing a legal system. The '*legis*' probably referred more to their recognition and regulation by *lex*, especially the Twelve Tables, than to any necessity that the cause of action should be statutory (though most of such causes did appear in the Tables and later statutes).

Five forms of *legis actio* are retailed to us. There may have been one or two more very specialised proceedings for very special cases (e.g. *damnum infectum* where a neighbour's failure to maintain his premises was likely to ruin or impair one's own property), and Gaius also reports that one of the five may not have been a true *legis actio*. The survival of self-help is prominent in that two of the *actiones* are not litigation in any modern sense, just regulated self-help.

1. *Sacramentum*

This was the original form of litigation and probably began as an appeal by the parties to religion in the form of the priests to provide a satisfactory method of settling the dispute. This is shown by the name itself, the rather elaborate ritual and the original payment of the wagers involved to the pontiffs. The civil authorities then took over the procedure very early, keeping it very much in the same form. The original subject matter of the dispute would be competing claims, not claim and defence. The questions to be settled would be, e.g., 'who owns this plough?', 'who is heir to the deceased?', 'in whose

family and power is this child?', 'is this man free or slave?'. There would be a definite *res* or person in dispute and the competing claims would have to be judged after each had formally asserted his claim. The existence of this form of subject-matter *really* present to the court explains the later name for the proceeding, *in rem*. The *sacramentum* devised for such proceedings later became adapted to settle disputes in which one party claimed that another had wronged him or owed him something. This came to be known as the proceeding *in personam*. The *actio per sacramentum* remained the primary form of litigation till the end of the *legis actio* system and it was always an alternative, though not a popular one, to the later *actiones* that were devised for specific claims.

Nearly all of what Gaius wrote of the proceedings *in personam* is missing, nor is it possible to discover why he dealt with it before those *in rem*. The procedure *in rem* has, however, come down to us, but not without many difficulties. Basically it was as follows —

The plaintiff secured the presence of the defendant before the praetor, the Twelve Tables entitling him, if the defendant refused to come, to bring him by force; and the object in dispute, *e.g.* the slave, had also to be there. If this was impossible, *e.g.* the object was land or a house, some part of it, such as a clod, was later brought by way of symbol; originally no doubt the claim was made on the land itself. The Roman procedure remained crude right down until the *cognitio*: appearance of the defendant had to be procured by the plaintiff within the principles of regulated self-help and was not enforced by the State. The plaintiff then, holding a wand (*vindicta* or *festuca*) in one hand, seized the object with the other and claimed ownership at civil law in set formal words, placing his wand upon the slave in token thereof. Thereupon the defendant went through exactly the same ceremony and used the same words, and then the praetor ordered them both to release the slave, which they did. The plaintiff next asked for the defendant's title, the defendant's reply being a general assertion of ownership. Whereupon the plaintiff denied the right and challenged the defendant to a bet and the defendant made a like challenge. After some further unknown proceedings, the praetor then —

- (i) awarded possession of the slave to one of the parties

pending the trial (*vindicias dicebat*), presumably the claimant who had had possession until then ;

(ii) required the person so given possession to provide sureties (*praedes litis et vindictiarum*) for his adversary that if he lost the case he would restore the thing and its profits to him ; and

(iii) required both parties to give security (by *praedes*, i.e. sureties who gave a pledge of lands) for the amount of the bet.

The person who, in the result, lost the bet forfeited it, at first to the priests, later to the State ; and originally, it seems, the wagers were actually deposited with the *pontifex*, so that security for payment was then unnecessary. The amount of the wager (*sacramentum*) was 500 *asses*, unless the thing in dispute was of less value than 1000 *asses* or the action was to determine whether a man was free or a slave, in both of which cases it was 50 *asses* only.

Ultimately the trial before the *iudex*, which it was the sole object of these cumbrous proceedings to secure, took place. In certain cases, e.g. where peregrines with *commercium* or coming within a treaty were involved, a speedy trial before a small group of judges known as *recuperatores* was available in place of one with a single *iudex*. In the later Republic a solemn court of 105 members (*centumviri*, drawn from the 35 tribes) sat to hear certain real actions, especially *hereditatis petitiones* ; a court of ten men (*decemviri*) tried cases of liberty. Whether they were alternative to single *iudices* is unknown. The court of the *centumviri* survived well into the Empire and still continued to use only the *sacramentum* procedure.

Originally the proceedings ended with the appointment of the *iudex*, but a *lex Pinaria* of unknown date required an interval of thirty days before he was appointed. On this appointment the parties (whether the action was real or personal) gave notice of trial for the next day but one. At the trial each first explained shortly the main points of his case (*causae coniectio*) ; then the evidence was gone into, any *responsa* on the law were heard and the *iudex* gave his decision (*sententia*) as to which *sacramentum* was *iniustum*, thus indirectly deciding the main issue. Details of how this indirect judgment was executed are unknown, but no doubt the existence of the *praedes* served to ensure satisfaction.

The proceedings *in personam* would be a simplified version, involving a claim, a denial and two wagers but no wands or

vindiciae (or *praedes* for them). The amounts of the wagers would be the same as those *in rem*, the amount being claimed serving as the basis for calculation. How claims for unliquidated sums were eventually decided is unknown. Originally there were probably technically no such claims, all actions being either for a definite sum (either owed 'contractually' or laid down by statute as a tariff for an injury) or for the value of a definite thing or a multiple thereof. In the latter case, as in proceedings *in rem*, some form of agreement, however crude, must have been reached before the sum of the wager was specified. Execution in the case of a judgment *in personam* would be by *manus iniectio* (*infra*).

2. *Iudicis sive arbitri postulatio*

This was a simpler procedure, probably introduced by the Twelve Tables, and it applied as an alternative to *sacramentum* in a few cases specified by *leges*. Thus, the Tables applied it to claims upon a stipulation and to petitions for the division of an inheritance (*familiae erciscundae*), while a *lex Licinia* extended the process to the division of common property (*communi dividundo*). It was thus available for claims of liquidated (and perhaps unliquidated) amounts and for adjudications involving considerable discretion in the judge. The latter, along with the possible unliquidated claims, account for the appearance of an *arbiter* in title. Whether one obtained a *iudex* in some cases, an *arbiter* with his wider discretion in others, or whether an appointee had functions both of judging and of assessing is unknown and greatly disputed. The process may well, however, mark the first introduction of arbitration as distinct from strict judging in Roman law.

In the proceedings before the praetor the claimant stated his claim giving its grounds (e.g. 'you owe me 10,000 sesterces under a *sponsio*') and called upon the defendant to acknowledge or deny. Upon a denial the plaintiff formally asked the praetor to give him a *iudex* or *arbiter*. The appointment was made forthwith. There were no wagers or other penalties and apparently no sureties.

3. *Condictio*

The *legis actio per conditionem* was that form of process under which the plaintiff obtained a *iudicium* by giving notice

(*condictio*) to the defendant, requiring the defendant to appear before the magistrate on the thirtieth day from the notice, to have a *iudex* appointed. The account given by Gaius is not at all detailed, but it appears that it was a personal action introduced by a *lex Silia* in the case of claims for a definite money payment and that the *lex Calpurnia* extended it to the recovery of any other certain thing.

The plaintiff obtained the presence of the defendant before the magistrate and stated his claim, which was denied by the defendant. If the claim was for money owed (*e lege Silia*), it may have been that the parties, at the plaintiff's suggestion, agreed by mutual *sponsiones* that the person whose claim proved unfounded should give the other not merely the sum in dispute but a third of its value as well. This would be a wager, as in the case of the *sacramentum*, but the wager would go to the party who proved successful and not to the State. The whole basis for this supposition of the cross-stipulations for a third is that under the formulary system such an institution existed in the *condictio certae pecuniae* and while such a supposition appears quite possible it is remarkable that Gaius did not mention the stipulations in his treatment of the *legis actio*. After the claim and denial the plaintiff founded his right to a trial by requiring the defendant to appear on the thirtieth day to have a *iudex* appointed. At the end of the time the plaintiff became absolutely entitled on application to the magistrate to have the *iudex* appointed; and the trial proceeded in the ordinary manner.

Gaius remarks that it is not very clear why it should have been necessary to establish this particular *legis actio*, because a claim could equally well have been enforced by the two other methods. It no doubt afforded creditors a simpler remedy than that given them by the *sacramentum*, but what the advantage was over *iudicis postulatio*, from which *condictio* differed primarily in not containing any statement of the cause of action, is quite uncertain.

After the introduction of the *condictio*, probably in the middle of the Republic, the new *legis actio* probably took over very many of the claims *in personam* (e.g. on a loan, on a stipulation, perhaps on statutory penalties) from *sacramentum*, which would be most used now for actions *in rem*, whilst *iudicis postulatio* would be employed for unliquidated

claims and partition actions. Too little, however, is known for dogmatism.

4. *Manus iniectio*

Originally *manus iniectio* had no necessary connexion with an action. The oldest of the *legis actiones* and never much more than regulated self-help, it was a method of execution upon the person, *i.e.* the creditor took the body of the debtor in satisfaction of his claim. The Twelve Tables provided that a man who either had admitted that he owed another money (*confessus debitor*) or had been adjudged liable to pay by the court (*iudicatus*) should have thirty days in which to pay. At the end of that time the creditor might lay hands (*manus iniectio*) upon the debtor and take him before the magistrate. The debtor could not resist the arrest himself. If the debtor did not pay the debt and no one opposed the claim on his behalf, the magistrate pronounced him *addictus* and the plaintiff took him away, put him in irons in a private prison and provided him with food daily or let him consume his own. This continued for sixty days and on three consecutive market days the plaintiff had to produce the debtor publicly and proclaim the amount due. Failing satisfaction, the debtor, on the last of these days, could, it seems, according to the strictly literal rendering of the Twelve Tables, be killed or sold as a slave *trans Tiberim*. If there were several creditors, they could cut the debtor up and divide him between them.

Gaius gives a brief account of what looks like its developed form. The plaintiff, after stating that the defendant was condemned to pay him so much money, announced that he arrested him for it, at the same time seizing his body. The debtor was not allowed to resist arrest or to defend the claim personally and, if he failed to secure a *vindex* to defend the action for him (or to pay the debt), he became *debitor addictus* to the creditor, who took him home to the family dungeon. Gaius gives no description of the subsequent proceedings and his statement, so far as it goes, corresponds substantially with the provision of the Twelve Tables. If a *vindex* intervened, the debtor was released and proceedings taken against the *vindex*, who, if he failed to justify his intervention, was cast in double damages. It is possible that, by custom or by *lex*, *manus iniectio* in this form was available also where a person was *damnatus* (or

damnas), as, e.g., in the legacy *per damnationem* (*ante*, p. 267) or on the *lex Aquilia* (*ante*, p. 416) or perhaps in *nexum* (*ante*, p. 308) or wherever one was liable for double damages on denial of liability; but there is too little evidence to be sure.

Gaius tells us that *manus iniectio* was afterwards extended to persons placed by law in the position of judgment debtors (*pro iudicatis*). The *lex Publilia*, e.g., gave *manus iniectio* to a surety who had paid the debt, against the principal debtor unless repaid by him in six months and the *lex Furia de sponsu* allowed it against a creditor who had exacted more than a proportionate share of his debt from one of several sponsors. Similarly, *manus iniectio pura* (i.e. in cases other than where given against *pro iudicatis*) was granted under the *lex Furia testamentaria* against legatees who received more than 1000 *asses* from a testator and by the *lex Marcia* against usurers who had exacted interest on a loan. The form *pura* was obviously a development of the older ones and less harsh: there was no need for a *vindex* for one could defend oneself, but whether one was, like the *vindex*, liable *in duplum* if one did is again uncertain. The new form was extended and by a *lex Vallia* (probably of the later Republic) anyone arrested by *manus iniectio* could personally defend the action, except the judgment debtor and the principal indebted to his sponsor. The result would seem to be that in a fair number of cases a plaintiff who did not expect any defence could proceed towards summary execution, while the defendant was now safeguarded by being able to plead a defence personally if he had one.

Manus iniectio, in all its forms, apparently went out with the other *legis actiones* and was abolished by the *leges Iuliae*. The idea, however, continued into the formulary procedure, the process of summoning a judgment debtor (or defaulting principal) before the praetor in an *actio iudicati* (or *depensi* against the principal) being but a mild form of the old arrest. The execution *in personam* may not have remained the normal one, the praetorian *bonorum venditio* being more usual, but there is no doubt that it existed right up till the *cognitio* replaced the *formula*.

5. *Pignoris capio*

The *legis actio per pignoris capionem* almost certainly never amounted to an action in the ordinary sense, i.e. a means of

obtaining a trial before a *iudex*. As described by Gaius (though it was obsolete in his time), *pignoris capio* was execution, not on the debtor's person, but upon his property, the nearest English term being 'distress'. Gaius says it was employed in some cases by custom, in others by statute. By custom it was granted to soldiers against the persons liable to provide either their pay or money to buy a horse or to buy fodder for the horse. By statute the remedy lay, in default of payment, against (i) the purchaser of a victim for sacrifice; and (ii) the hirer of a beast of burden which had been let to him to raise money for a sacrifice. Further, the censor allowed a farmer of the public revenue (*publicanus*) to use *pignoris capio* against persons who failed to pay their taxes.

Since, in all these cases, the person who made the distress had to use a set form of words, Gaius says the proceeding was generally considered a form of *legis actio*; but that others thought that it was not so, being performed in the absence of the praetor and often of the other party, whereas a *legis actio* proper took place, in part at least, in the presence both of the praetor and the defendant; and, further, because *pignoris capio* could be made even on a *dies nefastus*, when a *legis actio* was impossible.

It will be noticed that *pignoris capio* means literally 'the taking of a pledge', i.e. security for payment, and Gaius does not state what was to happen on failure of payment. There was no right of sale; indeed, sale would be theft. It seems to have been merely distress with no action to enforce redemption. However, if the distrainer chose his distress well, no doubt that was sufficient remedy to achieve redemption and perhaps a penalty as well.

The chief defects of the *legis actio* system were as follows —

(i) Its extreme technicality: a litigant, however strong the merits of his case might be, failed altogether by making even the slightest mistake in procedure. It was, as Gaius points out, necessary for him to keep exactly within the terms of the law which gave him the right he was asserting; so, if the precise legal right was to proceed against another for cutting down trees (*arbores*), the plaintiff who sued a man for cutting down his vines (*vites*) failed, if he so termed them in his pleading, even though trees had been construed to include vines.

Moreover, the claim had to be made orally and thus learnt by heart, with all the more chance of a fatal mistake.

(ii) Once the solemn words of the *legis actio* had been pronounced *in iure* and the issue between the parties so formulated, the proceedings reached what was called *litis contestatio*, which had the effect of wholly destroying the plaintiff's original right of action; thenceforth he could rely solely on his new right, *vis.* that the trial should be undertaken by a *iudex* and the defendant, if in the wrong, condemned. From this it followed that failure to keep within the letter of the law during the procedure *in iure* meant not only that the particular action must fail but that the right to sue at all had gone for ever.

(iii) The system was incapable of adequate expansion.

The history of the replacement of the *legis actiones* by the *formula* and the development of the *formula* has been discussed in connexion with *edicta magistratuum* (*ante*, p. 23). In imperial times the *legis actiones* remained only in the centumviral court and, theoretically, for *damnum infectum*, for which, however, the almost invariable remedy was now the praetorian stipulation (*post*, p. 468). Otherwise they survived in form alone in *cessio in iure* and the various ceremonies involving *manumissio vindicta*.

(B) The Formulary System

1. Procedure

In order to obtain the *formula* the plaintiff had to summon the defendant before the praetor (*in ius vocatio*), giving him notice of the claim. If the defendant failed to obey the summons, or to come to terms with the plaintiff, or to furnish a *vindex* to answer for him, the praetor provided a penalty in his edict by an *actio in factum*. The plaintiff could bring the defendant by force before the magistrate, and, if he lay concealed to avoid the summons, the praetor gave the plaintiff possession of his estate (*missio in possessionem*), with a right of sale as a last resort (*bonorum venditio*). In some cases a plaintiff could not summon the defendant without first obtaining the praetor's leave, *e.g.* when suing a parent or a patron.

If the hearing *in iure* could not be finished on the day of appearance, the defendant had to enter into recognisances (*vadimonium*), *i.e.* to promise, in answer to a stipulation, to

appear on the day appointed. When the defendant was only required to do this, the *vadimonium* was *purum*; but in certain cases he had to be supported by sureties. (Originally, in the *legis actio* system, the security had always to be given by sureties called *vades*; whence *vadimonium*.) The plaintiff, having got the defendant before the Court, proceeded to state his claim and asked for a *formula* that seemed to fit his case from among those usually set forth in the edict. If the praetor were satisfied, the *formula* would be granted. First came the appointment of the *iudex* (*nominatio iudicis*) from the *album iudicum* very much as under the old system: the plaintiff proposed a *iudex*, or where appropriate an *arbiter* or *recuperatores*, and the defendant either accepted the proposal or swore he did not trust the impartiality of the nominee. The plaintiff would keep suggesting names until the defendant accepted — a defendant who kept refusing unreasonably would be treated as *indefensus* like the man who hid from the summons (*supra*). The chosen judge had to act in the absence of a recognised excuse. The *nominatio* was followed by the terms of the *formula*, composed with great care, for the instruction of the judge.

The proceedings had now reached the very important stage of *litis contestatio* or joinder of issue (*post*, p. 448), probably so called because under the *legis actio* system, after the formulation of the claims of the parties in appropriate *certa verba*, the litigants seemed to have made an appeal to their witnesses *in iure* to bear witness to the verity of their claims, a feature which might perhaps be present here too. The next stage took place, after an interval, before the *iudex*, who was directed, usually, to condemn or absolve the defendant according to his findings under the directions in the *formula*. Condemnation was in money; there was normally no appeal, but in certain cases there might be relief by the praetorian *restitutio in integrum*. If after thirty days the judgment was not satisfied the *actio iudicati* could be brought more as a formal procedure to regularise execution than as a true action. However, the defendant could resist the *actio* and, by pleading absence of a judgment or formal invalidity of a judgment and at the risk of having to pay double damages, proceed to a *iudicium*, but in such cases a surety was required to give the necessary *satisfactio* (personal security). The creditor could still, under

the sanction of the praetor, march his debtor home as in *manus iniectio* and make him work off the debt, but the infliction of cruel punishments or of death or sale into slavery had all disappeared with the *lex Poetelia*. The method of personal seizure was thus robbed of its terror for recalcitrant debtors and it was probably now employed mainly where the defendant had no assets (e.g. a thief) — one could at least force him to work in payment. For normal cases the praetor introduced, as an alternative, execution on the debtor's property called *bonorum venditio* (*post*, p. 469).

2. The formula

The chief parts of the *formula* will be considered briefly.

(i) *Nominatio iudicis*, 'Let Titius be judge' (*Titius iudex esto*), invariably found. An *arbiter* was appointed as a *iudex*, for such he always was, his discretion being additional to his *iudicium*. Where there were *recuperatores* the form was suitably adapted, 'Let *A*, *B* and *C* be *recuperatores*'.

(ii) *Praescriptio*, where needed, came next. Its purpose might be — (a) *Pro actore* to protect the plaintiff by narrowing down his claim; e.g. where performance was to be made by way of instalments of which some only were due. This was effected by inserting a clause limiting the claim to what was due at the moment only. (b) *Pro reo*, in the interests of the defendant. Thus *A*, as the heir of Balbus, claims a slave from *B* and *B* claims likewise that he is the heir of Balbus, not *A*. It is not desirable that the question of the inheritance should be thus incidentally decided. *B* accordingly has a *praescriptio* inserted to the effect that the action is not to be decided if to do so would prejudice the question of the right to the inheritance, as in this case it does. This forces *A* to bring his *hereditatis petitio* first to decide the question of heirship. In later law the *praescriptio pro reo* was replaced by the *exceptio*.

(iii) *Demonstratio*. Gaius says it was the part of the *formula* which set forth at the outset, not the claim, but the facts out of which the claim arose. It was not an essential part of every *formula*, but seems to have been used in actions *in personam* where there was a *condemnatio* for unliquidated damages. Thus it was present in all *bonae fidei iudicia* (e.g. on sale), in the *actio ex stipulatu* (i.e. for a promised act) but not in *condictiones*. It would not be in most *actiones in factum*, but would be where

a judge was to condemn for what he thought *bonum et aequum* (fair and just). A *condemnatio* for the value of a *res*, though uncertain, was *not* unliquidated, thus no *actio in rem* had a *demonstratio*. Gaius's example is, 'Inasmuch as *Aulus Agerius* [the plaintiff is always so designated in examples of *formulae* from the verb *agere*, to sue] sold [or 'deposited'] a slave to [or 'with'] *Numerius Negidus* [the designation of the defendant, from *negare*, to deny]. A mistake in the *demonstratio* was not fatal; either an adjustment was possible or the action could be brought again with the facts correctly described.

(iv) The *intentio* was the clause of the *formula* which contained the plaintiff's statement of claim and in the *intentio* the plaintiff either alleged a civil law right (when the *intentio* was *in ius concepta*) or a state of facts which the praetor considered ought to constitute a right (*in factum concepta*). The word *paret* is usually the mark of this clause which, in addition to the nomination of the *iudex*, was the one thing absolutely necessary in every action; for, obviously, there can be no suit without a statement of claim. Sometimes the *formula* might consist solely of the judge's nomination and the *intentio*; e.g. where some preliminary issue had to be determined, such as whether a given person was a freedman or not; a question of fact which, since it involved no liability on the part of any third person, did not require a *condemnatio*. In *formulae* with a *demonstratio* the *intentio* was merged in the *condemnatio* as a sub-clause, e.g. 'Whatever on that account it appears that *NN* should pay or do for *AA* ['as a matter of good faith' in *bonae fidei iudicia*] for so much let the judge condemn *NN* to *AA* or absolve him'. It was the *intentio* that gave the clue to the nature of the action — whether it was *in rem* or *in personam*; *stricti iuris* or *bonae fidei*; *in ius concepta* or *in factum concepta*; for a *certum* or for an *incertum*.

(v) *Exceptio*. This was a special defence raised immediately after the *intentio*. If the defence was a denial of the plaintiff's claim, no *exceptio* was needed. But if the plaintiff admitted the validity of the claim, but nevertheless alleged certain circumstances in his favour which on grounds of equity or otherwise entitled him to be absolved, such special defences had to be raised by way of *exceptio*. Some *exceptiones* rested on enactments of one kind or another, e.g. the *exceptio S.C. Macedoniani* (*ante*, p. 325); others might be based on the

praetorian edict, which was more usually the case, *e.g.* the *exceptio doli*; these were mainly equitable in character. In form it began with words such as 'unless' or 'except', *e.g.* 'unless it appears that *B* was a *filiusfamilias*'. Equitable *exceptiones* did not need to be pleaded in *bonae fidei* actions on account of the words *ex fide bona* which appeared in the *formula* and permitted the judge to take such matters into account in his *sententia*; but they had to be expressly pleaded in other actions (including, probably, actions *in factum*), while those resting on enactment had always to be pleaded.

To the *exceptio* there might be a *replicatio* (reply) inserted for the plaintiff's benefit, which, if proved, destroyed the force of the *exceptio*. *A*, *e.g.*, claims 50 *aurei* from *B*, who pleads the *exceptio pacti de non petendo* (a pact not to sue). *A*, by *replicatio*, alleges that subsequently *B* agreed to pay (*replicatio pacti de petendo*). A *duplicatio* might reply to this, thence a *triplicatio* and so on.

Exceptions were either *peremptoriae* (or *perpetuae*) which would defeat the action at any time, *e.g.* the *exceptio doli* and those based on statute, or *dilatoriae* (or *temporales*) which equally sufficed to defeat the action but which could be avoided, *e.g.*, by the plaintiff's delaying *litis contestatio* or by his changing his representative, where he had claimed too early or had appointed an improper person respectively.

In classical law an *exceptio*, when upheld by the judge, destroyed the action. The judge had to absolve, he could not lessen the damages for he had no such power under the *formula*. An *ex fide bona* clause was thus contrasted very strongly to this position for thereby the judge had such a power within the *formula*.

(vi) *Condemnatio*, which appeared in nearly every case, but never alone, was the clause which empowered the judge to condemn or absolve according to whether the plaintiff proved his case or not. The *condemnatio* was *certa* where, the claim being for a liquidated amount (*e.g.* 50 *aurei*), the judge was told to condemn in that amount; it was *incerta* where the damages were left to the judge; and his right to assess damages in the latter case might be unfettered or might be limited by the *formula* (*taxatio*), *e.g.* 'condemn in what you consider the value, but not beyond (*dumtaxat*) ten thousand sesterces'. Such a *taxatio* might be inserted by the praetor or by the

plaintiff (e.g. *actio iniuriarum*), but its exact incidence is unknown. It would, however, be used to limit an action, where appropriate, to a *peculium* or an extent of profit (*in rem verso*) or what the defendant has power to pay (*beneficium competentiae*). The condemnation clause (whether *certa* or *incerta*) was always framed so as to authorise the ultimate judgment's being given for a sum of money. Hence specific performance or restitution could not be decreed in an action for the recovery of corporeal property. But specific restitution was practically obtained by means of the *clausula arbitraria*, which directed the *iudex* to order specific restitution and to condemn only if this was not obeyed. The plaintiff was thereupon required to assess the value of the thing on oath (*iusiurandum in litem*) and the defendant was condemned to pay the sum as assessed. Gaius seems to imply (*sicut olim*) that under the *legis actio* system specific restitution could be ordered.

(vii) The *adiudicatio* only occurred in place of the *condemnatio* in the case of partition suits and was the clause which enabled the judge to divide the property among the various parties to the suit (e.g. co-heirs). Since it rarely happens that property can be divided with absolute equality, the *adiudicatio* might be combined with a *condemnatio* empowering the judge to order those persons who obtained more than their fair share to pay monetary compensation to the others.

3. *Litis contestatio*, the trial, appeals

When the *formula* was complete and delivered to the parties by the magistrate, *litis contestatio* took place, and the proceedings *in iure* came to an end. *Litis contestatio* had the following effects—

(i) If the proceedings took the form of a *iudicium legitimum in personam* alleging a civil law right, *litis contestatio* operated as *novatio necessaria*: the plaintiff's right of action was at an end and replaced by his right, if the trial ended in his favour, that the defendant should be condemned. This effect, however, was not produced by a *iudicium imperio continens*, or by a *iudicium legitimum* if *in rem* or *in factum*. In these cases the plaintiff might bring a fresh action, but if the former action had really covered the same point, the defendant could defeat it by means of *exceptio rei iudicatae*, *vel in iudicium deductae*. Whether the *exceptio* referred to in Gaius is one, or really two separate ones, is not clear.

(ii) In a *iudicium stricti iuris* the value of the property in question was ascertained at this stage, instead of at the date of the judgment, which was the case where the *iudicium* was *bonae fidei*. This was, however, only a general rule and it varied quite considerably in individual actions.

(iii) In all cases the thing in dispute became *res litigiosa* and could not be alienated.

(iv) Thenceforth the action was available to and against heirs, even where it was not transmissible otherwise (e.g. *actio iniuriarum*).

(v) In cases of delict, where the heir was suable so far as enriched, the enrichment was determined at this moment.

(vi) The action became a *lis pendens*, and so stopped prescription; i.e. the plaintiff could no longer be barred for his failing to bring his action in due time; e.g., if an action had to be brought within a year and was so brought, it could continue to judgment though the year had expired.

(vii) From this moment the defendant, if he subsequently failed, was bound in *stricta iudicia* to account to the plaintiff for all profits or fruits arising from the object in dispute and became liable, whether originally so bound or not, for *exacta diligentia* in the custody of such object.

(viii) The Proculians held that in an action *stricti iuris* the liability of the defendant was determined at the moment of *litis contestatio* and that if at the trial he proved to have been in the wrong then, no subsequent event, e.g. the accidental destruction of the object — or even payment of everything due, could save him from condemnation. The Sabinians adopted the opposite and more lenient view and their opinion was accepted in the late classical period, if not before.

(ix) *Usucapio* was not interrupted, but prescription was; this was of no importance as the decision would go as the facts stood at *litis contestatio*.

In certain cases the proceedings might never get beyond the hearing *in iure*. This would be the case —

(i) Where the object was to obtain security rather than redress; e.g. the defendant was required to enter into a stipulation to indemnify the plaintiff in respect of apprehended damage.

(ii) Where, in lieu of evidence, the matter was decided by the oath of the parties. This could be done in *condictiones*

and a few other actions for a *certum*. The plaintiff could tender an oath (*iusiurandum*) to the defendant, who then had a choice of three actions: he could accept and swear, thus winning the case; he could refuse (or do nothing) and thus lose the action; he could refer the oath back to the plaintiff, who would then *either* swear and win *or* refuse and be denied an action by the praetor.

(iii) A trial was unnecessary where the defendant admitted his liability before the praetor (*confessio in iure*).

(iv) Sometimes a plaintiff, before asking for a *formula*, might ask a possible defendant for information (*interrogatio in iure*), e.g. whether the defendant was the heir of Balbus, against whose estate the plaintiff had a claim. If the answer was truthfully in the negative, there would be no point in proceeding with the action.

The subsequent trial took place on a day fixed by the praetor or the judge himself. The trial was public, the parties appeared personally or by representatives (*post*, p. 468), and, in important cases, might have their cause pleaded by orators who at first acted gratuitously. Evidence was taken on oath, and, in lieu of evidence, the parties might agree that one should tender the other an oath, as before the praetor, or the judge might himself suggest this method, but in neither case does it seem that the *iudex* was strictly bound to decide on the strength of the oath. Finally, judgment was pronounced.

The judgment was technically called *sententia*, i.e. the opinion of the private individual on the facts, as distinguished from a *decretum* on the part of a magistrate; and once the *sententia* had been given the *iudex* had no power to vary or discharge his decision. *Recuperatores* decided by a majority.

Appeals. Under the formulary system there was no right of appeal from the *sententia* of a judge, though in exceptional cases the judgment might be, in effect, annulled by the praetor's granting *restitutio in integrum*. The system of appeals may have been applied to proceedings by *formula* towards the end of that régime, but there is no evidence of this.

(C) *Cognitio Extraordinaria*

Even under the older system the public mind had become familiar with the idea that the magistrate might, as in modern

times, dispose of the whole matter; for this was, in fact, the case not only in the instances above mentioned, where for some reason the cause came to an end before the praetor, but whenever the praetor acted *extra ordinem*, i.e. outside the regular procedure, as he might. This would usually be with respect to administrative, not judicial matters, e.g. by interdict. But under the Empire this was extended to judicial functions, e.g. the *praetor fideicommissarius*, who enforced *fideicommissa*, and the *praetor tutelaris*, who came to appoint and remove tutors.

Further, from the establishment of the Empire, whenever the Emperor himself decided a case, the procedure was *extra ordinem*. The first general change was in the provinces — probably in the Imperial provinces at first, followed by the others — the change being complete probably before the end of the classical age. The Constitution of Diocletian (A.D. 294) did not inaugurate the change in the provinces, but simply directed provincial governors to hear the case themselves, except in unimportant cases where there might be a delegation to a *iudex pedaneus*, who seems to have been an official judge of some sort. This was merely a direction to greater diligence on the part of the *praeses*, not the origin of a new institution. It is probable that the *ordo* with its *formula* had been superseded even in Rome some time earlier, for Diocletian had reorganised the whole Empire, making a *provincia* the unit of administration, Italy itself being divided into seventeen provinces.

The system of *extraordinaria cognitio* as developed under Justinian was as follows —

In the first place, it was no longer requisite or proper for the plaintiff personally to secure the attendance of the other party before the magistrate. The magistrate himself summoned the defendant to appear on the plaintiff's written petition (*libellus conventionis*), and this request was served by the magistrate's agent, who might arrest the defendant if he refused to undertake to appear. The *libellus conventionis* was very like the *intentio* of the formulary system and the modern statement of claim, since it set forth in a succinct manner the nature of the plaintiff's right and the circumstances attending its alleged violation. It had to be signed by the plaintiff or his agent, and, in addition, the plaintiff undertook, by a *cautio* (which,

like the *libellus conventionis*, was registered in the *acta*), to pursue his action and, if unsuccessful, to pay the costs of the defendant. The statement of defence which the defendant was called upon to put in in answer was called the *libellus contradictionis*. The whole trial took place before the same magistrate, before whom the parties appeared on the appointed day and pleaded their cases. A *confessio* might take place, in which case judgment followed at once. An *interrogatio* might be put in at any stage, and the plaintiff might require an oath from the defendant, even against his will, not only in exceptional but in all cases, carrying with it the right to refer as before. *Litis contestatio* still took place, *viz.* at the moment when the issue had been definitely arrived at, each party having sufficiently put forward the matters on which he relied; but, although some of its ancient effects remained (*e.g.* it still prevented the plaintiff's action being barred by lapse of time), *litis contestatio* no longer operated as *novatio necessaria*, and the *exceptio rei in iudicium deductae* seems to have disappeared.

Finally, after hearing the evidence and arguments, the magistrate settled the whole matter, no longer by a *sententia*, but by a *decretum*, by which any sort of order which the circumstances demanded could be made, since the magistrate was no longer bound by a *formula* directing condemnation in a sum of money; so where the object of the action was the recovery of property, the magistrate might decree actual restitution; in other words, the defendant no longer had the option, in such case, of either paying damages or restoring the object. A defence other than a traverse (still called *exceptio*) no longer destroyed the whole action: the judge had power to lessen the damages. There might be an appeal through a hierarchy of Courts to the Emperor himself. After final judgment there followed a period for its satisfaction, failing which execution followed. There was now no *actio iudicati* or *bonorum venditio*. If the judgment was for some specific thing, officials were sent to seize it and make it over to the plaintiff. In the case of a sum of money, sufficient property belonging to the debtor was seized and later sold in satisfaction of it. In the case of insolvency the procedure was by *distractio bonorum* (*post*, p. 471).

II

The Division of Actions

Actions may be classified as follows —

1. *In rem — in personam — mixtae*

An action *in rem* was one brought in respect of some *res corporalis* (or person in *potestas*) which the plaintiff claimed as his own, and of this the *vindicatio rei* was the type. The defendant was not mentioned in the *intentio*, but in the *condemnatio*. Such actions included claims to servitudes (*actio confessoria*) or to freedom from servitudes (*actio negatoria*). An action *in personam* was brought to enforce an obligation due only from the defendant. The defendant was named in the *intentio*, which virtually claimed that he ought to give or do something for the plaintiff.

A mixed action was regarded by Justinian as both real and personal, as it might result in the award of property and condemnation in a money sum; the examples given are the *actio familiae erciscundae* (among co-heirs), the *actio communi dividundo* (between partners) and the *actio finium regundorum* (between owners of adjoining estates). Strictly, they seem to be *in personam*.

Prejudicial actions (*praeiudiciales*), to determine a preliminary issue, e.g. whether a man was born free, were held to be *in rem*. In classical law there existed besides the normal *actio in rem* a form that was a survival of *legis actio* times. In order to avoid some of the disadvantages of the full action *in rem* an *actio in personam* was used to decide the issue by use of a *sponsio* with a nominal penalty (which was never paid) as to whether the *res* was owned by the plaintiff. It was settled that this was an *actio in rem* despite its *in personam* form.

2. *Actiones civiles — actiones honorariae*

Of the former the *vindicatio* and the *condictio* are examples, being founded on the civil law. The latter were those which arose by virtue of the praetor's jurisdiction.

An example of a praetorian real action is the *actio Publiciana*, which protected a person in possession (which would ripen into *dominium* by *usucapio*) by allowing the fiction that

the period of usucapion was complete; the bonitary owner was completely protected by it, but the *bona fide* possessor had no answer to the true owner, who could defeat him by the *exceptio iusti domini*.

Examples of praetorian personal actions are — (i) *actio de pecunia constituta*, to enforce a *constitutum*; (ii) *actio receptitia*, which was an action against a banker based on his undertaking (*receptum*) to pay someone else's debt; (iii) *actio de peculio*; and (iv) actions against freedmen or children who proceeded against their patron or ascendant without the praetor's permission.

3. *Actio in ius concepta* — *actio in factum concepta*

In fact the terminology is inaccurate: it is the *formula* that is thus *concepta*, but convenience condones the usage. An action *in ius* was where the *intentio* alleged a legal right, e.g. 'the farm belongs to AA' or 'NN ought to pay or do'. *Actiones utiles* based on such actions may be classed with them, though perhaps not strictly so. An *actio* was *in factum* when the *intentio* set out certain facts only. Some actions (e.g. *commodati* and *depositi*) had *formulae in ius* and *in factum*, the latter being probably the older, but their distinction in function is uncertain.

4. *Actio utilis* — *directa*

Actio utilis. The praetor, instead of introducing a new right by an *actio in factum*, might retain the *formula* applicable to a civil law right, or to an existing praetorian right, and modify it to suit the new facts. An action of this kind was called an *actio utilis*, i.e. an *actio* utilised to meet new cases; the modification might, but need not, be by means of a fiction (hence the *actio fictitia*, a form of *actio utilis*). Another major form of *actio utilis* was one with the *formula Rutiliana*, i.e. one person's name in the *intentio*, another's in the *condemnatio*. The *formula* was originally devised to allow a *bonorum emptor* (*post*, p. 470) to sue on actions available to the insolvent. Some at least of the *actiones adiectitiae qualitatis* were probably in this form, and so were actions by representatives (*post*, p. 468).

An *actio directa* (not a classical term) on the other hand was where the *intentio* was unmodified, following exactly the words of the civil law or the edict.

An *actio utilis* might be founded not merely on an existing *actio in ius*, but on an *actio in factum concepta* in much the same way.

The *actio praescriptis verbis* (the remedy on the innominate contracts) very probably was post-classical and never had a *formula*. Any examples of it in classical times were probably *in factum*.

5. *Stricti iuris — bonae fidei*

The division by name is probably post-classical, the classical lawyers recognising *bonae fidei iudicia* as a distinct class, but not contrasting them with any other class. Under Justinian the division is one within actions *in personam in ius*, the *stricta iudicia* being upon purely unilateral contracts and quasi-contracts (whence *negotia stricti iuris*) and the *bonae fidei* upon bilateral contracts and quasi-contracts (*negotia bonae fidei*). The distinction is not a happy one even under Justinian: for the most part the *bonae fidei iudicia* can equally be contrasted with actions *in rem* and *in factum* (except for those which were *ex bono et aequo*, probably to be classed with the *bonae fidei* actions for most purposes), and there is nowhere any list of *stricta iudicia*. Even within the narrow class of *stricti iuris* actions there are many exceptional rules; thus *pacta adiecta* were fully enforceable with *mutuum*, but probably not as such in other strict actions, and in the *actio ex testamento* interest was recoverable on a legacy although interest was not normally allowed in *stricta iudicia*.

The distinguishing mark of the *bonae fidei* action was the inclusion of the phrase *ex fide bona* in an *intentio* framed *in ius* for an *incertum*. Special consequences followed.

(i) The *formula* was liberally construed. There was no need to plead equitable *exceptiones* and the judge would take into account commercial practice and other similar considerations.

(ii) The construction of the *formula* allowed the raising by the defendant of counterclaims arising out of the same transaction, a consequence not possible in other actions of the time (*post*, p. 458).

(iii) Interest was recoverable in the action from *mora* (the date of the defendant's default): it was not normally recoverable at all in other actions.

(iv) 'Fruits' were also recoverable from *mora*, only from *litis contestatio* in other actions.

(v) At one time accidental destruction of the *res* involved

(or payment of the debt due) after *litis contestatio* did not prevent judgment for the plaintiff in a *strictum iudicium*, according to the Proculian view. The Sabinian view to the contrary was similar to that always recognised in *bonae fidei* actions, and it prevailed.

Among *bonae fidei iudicia* were classed by Justinian partition actions and the *actio praescriptis verbis*, neither of which were probably so in classical times (even if the latter existed then). Among his *stricta iudicia* the most prominent would be the *condictio*, the remedy for most unilateral transactions in Roman law. Without a *demonstratio*, the *formula* contained no grounds for the claim, merely asserting a duty to give something. Other *stricta iudicia* did lie for *incerta*, e.g. *actio ex stipulatu* (for a promised performance) and *ex testamento* (for a legacy).

6. *Iudicia legitima — imperio continentia*

The former were between *cives*, before a single *iudex*, the proceedings being held within one mile of Rome, and included any such action, even, e.g., those *in factum*; all others were *imperio continentia*. The distinction was perhaps due to the *lex Aebutia* and was material in various ways, for a woman needed the *auctoritas* of her tutor to be a party to a *iudicium legitimum* and *capitis deminutio* at once ended the proceedings, which under the *lex Iulia iudicaria* were also extinguished in eighteen months from *litis contestatio*. The other class rested on the magistrate's *imperium* and ended with it. The distinction, which enjoyed significance only under the formulary system, died with it. Theodosius fixed thirty years from *litis contestatio*, and Justinian substituted three years from the commencement of the proceedings, as the limit within which the proceeding in an action must be completed.

7. *Perpetuae — temporales*

Originally all actions founded upon the civil law were *perpetuae*, for no lapse of time was sufficient to bar them; praetorian actions, on the other hand, were usually *temporales* and were lost if not brought within a year; exceptionally, however, a praetorian action, if modelled on the civil law, might be *perpetua*, e.g. that given to a *bonorum possessor* and the *actio furti manifesti*. Conversely, even a civil law claim to specific property in the hands of another might be lost by the operation of usucapion; and the *querela inofficiosi testa-*

menti was expressly limited to five years. But the old distinction continued down to the time of Constantine, and Theodosius provided a thirty years' limit to practically all *perpetuae actiones*. Under Justinian the same principle obtained, though very exceptionally an *actio* might still be *perpetua*, e.g. where a minor or pupil was involved.

The differing rules in respect of lengths of time which an action might take have been considered in respect of the previous classification.

8. Actions for the recovery of a Thing—for a Penalty—Mixed

An action *rei persecuendae causa* was a term which covered every action, whether real or personal, of which the object was redress merely, as distinguished from an action for redress and a penalty (mixed), or for a penalty merely. A *vindicatio*, actions on *commodatum*, *mandatum*, *societas*, sale and hire, were all *rei persecuendae causa*. So too, an action on a *depositum*, unless the case was one of *depositum miserabile*, when the action might be 'mixed', as it would lie for double damages against a depositary, or his heir, if personally guilty of fraud. The 'mixed' classification was probably post-classical; other instances then were the *actio vi bonorum raptorum* and the action under the *lex Aquilia*. The *actio furti* was purely penal (*poenae persecuendae causa*), as in addition to the damages recoverable the owner could get the thing itself by a separate action. The distinction had real importance only in respect of the consequences of delicts and quasi-delicts (*ante*, pp. 394, 421).

Other classifications might exist, e.g. those *in simplum* and those for multiple damages (mostly penal); those transmissible to and against heirs and those not (again mostly penal); *actiones privatae* (most actions) and *populares* (e.g. in quasi-delicts where anyone might sue).

III

Compensatio and Deductio. Plus Petitio

(A) *Compensatio and Deductio*

According to the civil law, if an obligation was created by some *negotium stricti iuris* (e.g. a stipulation) and action was

brought upon it, the plaintiff had to succeed, although he owed the defendant an equal or greater amount on some other transaction. Each party must enforce his claim independently. A *negotium bonae fidei*, on the other hand, implied mutual obligations, arising from the same transaction, and the judge was therefore allowed in such cases to 'set off' the mutual claims of the parties, if, in his discretion, he thought right, though there was nothing in the *formula* expressly authorising him so to do except the words *ex fide bona*.

In the case of a banker (*argentarius*) and of the purchaser of a bankrupt's estate (*bonorum emptor*) a different course prevailed: the *formula* itself was modified. If an *argentarius* sued a customer, the modification was in the *intentio*, and he was said, therefore, to be compelled to allow for compensation, the *intentio* being framed as a demand for the balance only. This set-off was only for things owed of the same class as those principally claimed (e.g., as normally, money against money, but possibly wheat against wheat, but not wheat against money), and the debt set off had to be one due when the action was brought. This forcing of the banker to make the set-off in the *intentio* meant that he had to keep exact accounts, because if he failed to make the full allowance his whole action was lost for *plus petitio* and the mistake in the *intentio* barred a further action. The *bonorum emptor*, on the other hand, when suing some person who, though indebted to the bankrupt (whom the plaintiff represented), had a claim against him, sued with *deductio*; the *intentio* was for the full amount demanded, but the judge was instructed in the *condemnatio* to give judgment *cum deductione*, i.e. for the balance actually due. Here the debt did not have to be of the same kind and future debts could be estimated and set off against the claim. The *bonorum emptor*, not having the special knowledge that the banker had of his debtor's accounts and not being in such a position of trust, was favoured by the rule that *deductio* arose naturally in the *condemnatio* (and had not to be strictly set out in the *intentio*), for he thus did not risk *plus petitio*.

Marcus Aurelius seems to have provided that in *stricta iudicia* a plaintiff could be met by the *exceptio doli* unless he allowed for the set-off, which, of course, must have arisen under a different transaction, but perhaps of the same kind. Little is known of the extent or effect of the new rule or whether

it was extended in respect of other transactions to *bonae fidei iudicia*; perhaps it was strictly limited to special cases such as where what was really one transaction (e.g. a sale) was either wholly made by a series of stipulations or contained terms by stipulations. Failing to allow for the counterclaim probably meant the loss of the action by reason of the *exceptio*, though upon another view the *exceptio* operated only by way of reducing the *condemnatio*, so that the balance could be recovered.

Justinian allowed compensation in all cases without any express plea, whatever the nature of the action, save that — (i) the counterclaim must be easy of proof and (ii) it could not be made at all in actions on a *depositum* or to recover land wrongfully occupied. Justinian says that where the claims were easy of proof the claims were automatically (*ipso iure*) reduced. But these words are not to be taken as meaning that the two claims extinguished one another (wholly or *pro tanto*) at the moment the set-off arose; but that the counterclaim could be taken into consideration by the judge, though not expressly admitted in the plaintiff's *libellus conventionis*, and that such omission was not to be penalised in any way beyond the reduction of the claim by the amount of the set-off. In all cases the judge had wide discretion as to the considering and the admission or rejection of counterclaims.

(B) *Plus Petitio*

A plaintiff might make an excessive claim —

- (i) *Re*, e.g. 500 *aurei* instead of 400.
- (ii) *Tempore*, as where he sued in March for a debt due the following June.
- (iii) *Loco*, as where the promise was to pay at Ephesus and the action was brought at Rome.
- (iv) *Causa*, as where the promise was to give either fifty *aurei* or a slave, and the plaintiff sued only for one of the alternatives, so depriving the defendant of his option. Conversely, the plaintiff might claim too little (*minus petitio*).

The effect, in the time of Gaius, was as follows: a mistake in the *demonstratio* amounting to *plus petitio* destroyed the action but not the claim; if made in the *intentio*, it was fatal to both, and the praetor rarely gave the plaintiff *restitutio in integrum* in such cases. If, on the other hand, the plaintiff

claimed less than his due, the *intentio* was so far good, but the balance could not be claimed in the same praetorship; if it were so claimed, the defendant could raise the *exceptio litis dividuae* (that the plaintiff had no right to split up his demand). *Plus petitio* in the *condemnatio* did no harm, for the defendant could get *restitutio in integrum*, but if the plaintiff claimed less he lost the balance altogether. It was never fatal to claim, even in the *intentio*, one thing for another by mistake, e.g. 'Eros' instead of 'Stichus', for in the time of Gaius the plaintiff could bring a new action, and under Justinian the mistake could be corrected in the same proceeding.

Even under the formulary system, however, relief was given in respect of *plus petitio loco*. A praetorian action could be brought, called *de eo quod certo loco dari oportet*, by which on non-payment at a particular place the creditor could sue elsewhere, and the judgment would take into consideration any loss the debtor sustained by reason of the change of locality.

Zeno provided — (i) that where the *plus petitio* was *tempore* the plaintiff might sue again, on payment of the defendant's costs, and after waiting twice the time which would have been necessary otherwise; and (ii) that, where the plaintiff claimed less than his due, judgment might nevertheless be given for the whole. These modifications remained in Justinian's time, and that Emperor provided that if the overclaim was in any other way than *tempore* (e.g. *re*) the plaintiff was not to lose his case, but to be punished by being obliged to pay the defendant three times the amount of loss sustained by reason of the overclaim, e.g. in respect of excess paid in fees to a process-server.

IV

Praetorian Remedies

(A) Interdicts

Originally the term *interdictum* or *decretum* signified an order by the magistrate, issued by virtue of his *imperium*, directing an individual to do (*decretum*) or abstain from doing (*interdictum* in a strict sense) some act; and the order was usually issued in the interest of the public, rather than for the convenience of private individuals. The object, for example,

might be either to prevent or punish offences against property *extra commercium* (e.g. temples and burial-grounds) or to protect the possession of private property ; for the disturbance of the possession of individual citizens easily leads to a breach of the public peace. At first, such orders were probably made after the merits of the case had been fully considered and were therefore final. The magistrate, as representing and in the interest of the State, settled the dispute once for all. In the time of Gaius, however, this was not the general rule, for an interdict, in most cases, was an order made without entering into the question of the strict rights of the parties and the merits of the case had to be tried subsequently in an ordinary *iudicium* based on the *interdict*. Under the formulary system, therefore, an interdict was, usually, an extraordinary way of founding a trial before a *iudex* ; the *iudicium* depending not on the customary proceedings *in iure*, but on an order issued, in a summary way, by the praetor in his administrative capacity.

Interdicts may be classified as follows —

(i) An interdict might be *populare* (i.e. open to anyone) as opposed to private (i.e. only available for some definite individual), though most interdicts were of the latter class. An example of the former is the *interdictum de homine libero exhibendo*, by which anyone (even a woman or *impubes*) might, as by the English writ of *Habeas Corpus*, compel the production of any person confined against his will.

(ii) An interdict might be *prohibitorium*, *restitutorium* or *exhibitorium*. The first class (*prohibitoria*) forbade the doing of some act (e.g. disturbing possession, as in *uti possidetis* and *utrubi*) ; those termed *restitutoria* (e.g. *unde vi*) ordered a person to restore something wrongfully taken from another's possession ; while *exhibitoria* aimed at the production of some object wrongly detained, e.g. the interdict *de homine libero exhibendo* or that by which a *paterfamilias* compelled the production of a person under his *potestas* wrongfully detained by another.

(iii) An interdict might pass to or against heirs ; e.g. *unde vi* passed to an heir and *quod vi aut clam* against one while *uti possidetis* did not pass to or against one.

(iv) Some interdicts were concerned with the possession of property, e.g. *uti possidetis*, *utrubi*, *unde vi* ; others not, e.g. for the production of an individual. •

(v) Those concerned with possession were *adipiscendae*, *retinendae* or *recuperandae causa*.

Examples of interdicts for acquiring possession were the *interdictum quorum bonorum* and the *interdictum Salvianum*; for retaining possession, *uti possidetis* and *utrubi*; for recovering possession, *unde vi*.

(vi) A possessory interdict might be 'single' or 'double'. Interdicts were single (*simplicia*) where in the subsequent proceedings the person who obtained the interdict was plaintiff and his adversary defendant (as in all the interdicts *restitutoria* and *exhibitoria*); double (*duplicia*), where each party was at once plaintiff and defendant (e.g. *uti possidetis* and *utrubi*).

(vii) Lastly, an interdict might be either primary or secondary, *i.e.*, where the first interdict proved insufficient to enable justice to be done between the parties, an *interdictum secundarium* might follow.

Procedure in interdicts. The trial on the interdict, in the time of Gaius, took place sometimes by means of a *formula arbitraria*, sometimes *per sponsionem*. The former was the case when the interdict was either *exhibitorium* or *restitutorium* and the defendant at the time when the order was granted chose to ask for such a *formula*. The proceedings were *per sponsionem* whenever the *interdictum* was *prohibitorium* or, the *interdictum* being of the other kinds, the defendant failed to choose the *formula arbitraria*.

(a) By *formula arbitraria*. By way of illustration, suppose *A* asked the praetor for that species of *interdictum restitutorium* known as *unde vi*, against *B*, whom he alleged to have forcibly ousted him from possession of land. The interdict commanded *B* to restore possession to *A*, provided that *A* had been in possession *nec vi*, *nec clam*, *nec precario*, *i.e.* had not obtained it originally from *B* by force, or clandestinely, or by *B*'s permission. If *B* obeyed the order, the proceedings ended; if, as was usual, there was a dispute, *B* had the option (the interdict not being *prohibitorium*) to demand a judge, and if he did so a *formula (arbitraria)* was granted to try the questions of fact involved in the interdict. The proceedings *apud iudicem* would be in the ordinary form, and, if the judge found that *A*, having been in possession *nec vi*, *nec clam*, *nec precario*, had been violently ejected by *B*, he would order *B* either to restore possession or to be condemned in damages. This

procedure is described by Gaius as without risk to either party, as opposed to the procedure *per sponsionem*, as will be seen. For if, in the *actio arbitraria*, the judge found against *B* and he complied with the order, he did so without incurring any penalty. If, on the other hand, *A* failed to make out his case, he also suffered no detriment, unless the defendant had challenged him to a *iudicium calumniae* for a tenth of the value of the thing in dispute by way of penalty (*post*, p. 471).

(b) *Per sponsionem* (i) in single interdicts, e.g. *unde vi*; (ii) in double interdicts, e.g. *uti possidetis*, *utrubi*.

(i) Procedure *per sponsionem* in single interdicts. If *B* in the above case did not demand a *iudex* and failed to restore possession, *A* challenged him to a wager (*sponsio*) and *B* in return challenged *A* to a wager (*restipulatio*), the question at issue being whether or not *B*'s continued possession constituted a violation of the interdict; e.g. whether *A*'s possession when *B* ejected him had been *nec vi*, *nec clam*, *nec precario* in relation to *B*. Upon these wagers *formulae* were drafted and tried in an ordinary *iudicium*. In addition, *A* would secure an additional *formula* for a *iudicium de re restituenda* to be tried at the same time and instructing the judge to condemn *B* to pay damages if *A* won on the *sponsio* and *B* had not already restored the *res*: it was probably a form of the *iudicium secutorium*. In any case the unsuccessful party forfeited to the other the amount of the wager.

(ii) Procedure *per sponsionem* in double interdicts, i.e. where both parties were at once plaintiff and defendant, e.g. *uti possidetis* and *utrubi*.

Both interdicts were prohibitory (and so could only be tried *per sponsionem*) and applied where two persons were disputing about the possession of property as a preliminary to a dispute about the ownership of it. The interdict *uti possidetis* applied when the question was about immovable property, *utrubi* when it concerned movables. The interdict *uti possidetis* prohibited the disturbance of the possession of that party who, in fact, held the land when the interdict was issued, provided it was *nec vi*, *nec clam*, *nec precario* in relation to his opponent. In the interdict *utrubi*, on the other hand, it was not necessarily the party in innocent possession at the grant of the interdict who prevailed, but he who had possessed the movable innocently for the greater part of the past year. •

The procedure was as follows —

The interdict (e.g. *uti possidetis*) was issued, in effect prohibiting the person not in possession at the date of the interdict from disturbing the possession of the person who then held the land *nec vi, nec clam, nec precario* in relation to him. Matters obviously would go no further (since the order was purely negative) until some act was done in violation of the interdict. Both parties accordingly made a formal trespass upon the land, and the ultimate trial was to ascertain which party had been justified in so doing and which party was in the wrong as having contravened the edict, *i.e.* which had, when the interdict was granted, innocently been in actual possession.

The parties then appeared before the praetor, whose first duty necessarily was to award interim possession of the land until the question could be tried between the parties (*A* and *B*). This was settled by awarding possession to the person who made the highest bid (e.g. *B*) for the profits and fruits which would accrue from the land until the main issue was settled at the trial. Such an auction was called *fructuum licitatio*. *B*, however, was required to promise *A* by a *stipulatio* that if he lost the trial he would pay to *A* as a penalty the sum he offered for the profits. Next, *A* challenged *B* to a wager (*sponsio*) on the question whether *B* did wrong in the apparent act of trespass, which *B* accepted on *A*'s promising by a restipulation to pay the amount of the bet if in the wrong. Similarly *B* challenged *A* on the lawfulness of *A*'s act, and there was a like restipulation, so that in all there were two bets, which, having been put into the shape of *formulae*, were sent for trial. It is to be noted that a bet in Rome always involved two stipulations, so that on the two bets and the stipulation on the bidding there were five *condictiones certae pecuniae* in all to be submitted to the judge, who then heard the evidence and decided who had won his wager and *restipulatio*, *i.e.* which party, as a fact, when the interdict had been granted, held the land *nec vi, nec clam, nec precario* in relation to the other. If the judgment was in favour of *B*, *A* had to pay *B* the amount due on the wagers only. If, on the other hand, it was in favour of *A*, *A* was acquitted from his obligation on his bet to *B*, and *B* was condemned —

(1) To pay *A* the amount of the bets due to *A*.

(2) To pay *A*, as a penalty, the sum due from *B* on his

bidding for the interim profits; or, where the lower bidder chose the *iudicium fructuarium*, noted below, to pay *A* compensation for the profits he actually got from the land.

(3) To give up possession to *A*.

But to enforce this latter right a *formula* was added to *A*'s *formulae* for *B*'s *sponsiones* to secure a *iudicium secutorium* (or *Cascellianum*) to require *B* to pay damages if he did not restore the possession. A similar *formula* might also be added for a *iudicium fructuarium* if, at the *fructuum licitatio*, *A*, instead of taking a stipulation from *B* for the amount of his penal bid for the interim profits, had elected to rely on such *iudicium* to recover the profits, in which case *B* would be required at the time of the preliminary proceedings to give security for satisfaction of the judgment (*iudicatum solvi*).

It is obvious that the above proceedings could not be brought to a successful issue unless both parties were willing to go through certain forms, and it would therefore be in the power of one party to render the interdict useless as a means of determining the right to possession by refusing to take the necessary steps. The praetor, accordingly, devised a remedy. If one litigant refused duly to proceed, *e.g.* failed to make the formal trespass, to bid for the fruits, to enter into the wagers, or to go on with the trial, he thereupon became liable to *interdictum secundarium*, by which he was compelled, if in possession, to restore it to the other party; if not, to abstain from forcibly disturbing his opponent. In other words, the party in default was treated as having admitted his opponent's case.

The term '*exceptio*' is used less technically in interdicts than in actual *formulae* and it denotes any phrase restricting the scope of the order in the interdict. The most famous *exceptio* of this sort was that *vitiosae possessionis*, which prevented a party from retaining or recovering possession if he had gained his own possession *vi*, *clam* or *precario* from the other. It appeared in all the truly 'possessory' interdicts (*i.e.* not those *adipiscendae causa*) with the exceptions of *de precario*, which lay only against a tenant at will and so could not need it, and of the form *de vi armata* of *unde vi*. The special rule for *vis armata* was obviously aimed at discouraging the use of armed gangs for self-help, and it is doubtful whether one who had used such means could even plead previous *vis armata* by

his antagonist. The policy was carried even further because *de vi armata* could be sued out at any later date whereas *de vi cotidiana* (unarmed) was available only for a year. Both forms of *unde vi* relate only to land, although movables on the land at the time of the alleged dispossession were recoverable also.

Gaius says that the interdicts *uti possidetis* and *utrubi* were devised where persons were disputing about the ownership of a thing and to decide who ought to be regarded as in possession and who should be plaintiff in the action. It is obvious that the action referred to cannot be the *iudicia* on the interdicts themselves, for there both parties are plaintiffs, and the trials are not to decide a question of ownership but of possession merely. The fact is that the *iudicium* on an interdict (at any rate on the possessory interdicts) was not necessarily final. Usually, no doubt, it was, because if *A* was claiming property from *B* and could prove that he enjoyed it as a fact and that he had not obtained it from *B* by force, stealth or permission, the chances were that *A* had a better title than *B*. It might, however, sometimes happen that even when *A* won on the interdict, *i.e.* proved actual possession under the required conditions, *B* could show, in spite of it, that he nevertheless was *dominus*; for the trial on the interdict did not go into the question of ownership at all, and in such case a subsequent action was necessary, for which the interdict had cleared the way; for it had decided that *A* ought to be regarded as in possession and that therefore *B* was the proper plaintiff with the burden of proof to discharge.

Of the four possessory interdicts described by Gaius only the two last-mentioned (*uti possidetis* and *utrubi*) survived for any practical purpose in Justinian's time, the interdict *unde vi armata* having become obsolete, and the interdict *unde vi* less frequent, in consequence of the constitution of A.D. 389 (*ante*, p. 408). After that date a man who forcibly took property, if he was owner, forfeited not merely possession but the ownership itself, and, if not owner, was condemned to restore the property and pay its value. Under Justinian, the two surviving interdicts had the same effect, so that whether the dispute concerned an immovable (*uti possidetis*) or movable (*utrubi*), he prevailed who, at the time of *litis contestatio*, was in possession *nec vi, nec clam, nec precario* in relation to his adversary.

But Justinian's treatment of interdicts as judicial proceed-

ings, distinct from actions, is illogical and arose from too closely following the text of Gaius as a model for his own book. The whole complicated procedure, depending as it did on the formulary system, had long ceased to be a reality, and, as Justinian himself confesses, there was, under the *extraordinaria iudicia*, no necessity for interdicts, and judgment was given without them; accordingly, though the name survived, it was only to denote actions which were formerly begun in a special manner and which, perhaps, were still considered as deserving a speedier trial than other actions.

(B) *Restitutio in Integrum*

This was an exercise of the praetorian *imperium*, which, unlike the interdicts, was issued only after inquiry, to rescind some transaction which had detrimentally affected the legal position of the applicant and to restore the *status quo ante*. The application had ordinarily to be made within a year and the grant might or might not be final. To succeed in the claim to this remedy proprietary loss of some sort had to be shown in conjunction with some cause which the praetor thought was sufficient. The most usual of these were *dolus* (*ante*, p. 419), *metus* (*ante*, p. 420), minority (*ante*, p. 145), *adrogatio* (*ante*, p. 118); *absentia* due to State affairs, captivity and the like; and *error*, but only in mistakes connected with procedure and not normally in favour of a plaintiff.

(C) *Missio in Possessionem*

This was a magisterial decree based on the *imperium* authorising the grantee to take possession of, but not to remove, certain property belonging to another, generally with the purpose of putting pressure to bear upon him to perform a legal duty which devolved on him with respect to the grantee, *e.g.* where the owner of dangerous property refused to give security (*cautio damni infecti*) against damage apprehended from his neglect to maintain the property in a safe condition; another common case was as a preliminary to proceedings in bankruptcy (*bonorum venditio*). There were quite a number of other cases with greatly varying rules and effects. The *missio* might, according to the case in question, be of single pieces

of property, of a collection of pieces (*e.g.* an *hereditas*) or of all a man's property. If it did not have the desired effect, the praetor would usually follow up with a final remedy (*e.g.* sale).

(D) Praetorian Stipulations

These were very effective remedies to prevent any future injury or wrong, enabling the plaintiff to use a summary *strictum iudicium*. In some cases (*e.g.* on a tutor's appointment) stipulations might also be taken from sureties. Examples of praetorian stipulations have already been given (*ante*, p. 339).

V

Representation in Litigation

In the days of *legis actio* representation of either side was not normally possible: both had to appear in person for the necessary formal procedure *in iure* (even though *apud iudicem* they might use an advocate to plead their case). Tutors may have been allowed to represent their wards. Certainly statute allowed an *actio furti* to be brought on behalf of a captive.

Under the formulary system the theory was basically the same. However, the Rutilian *formula* allowed greater latitude. The principal's name appeared in the *intentio* (as claimant or defendant as the case might be) and the representative's in the *condemnatio* so that he could either receive payment and hold for his principal or make payment for him and later be reimbursed. It became possible, however, for steps in execution after the trial to be retransferred, with magisterial consent, to or against the principal.

The representatives were of two kinds — *cognitores* and *procuratores*. A *cognitor* was appointed by formal words and represented the principal more fully than the *procurator*, who was empowered merely by a *mandatum* or might even undertake the case unasked where this was reasonable. Where a *cognitor* sued, the principal could not sue later, the case being *res iudicata*. A *procurator* was, however, not such a representative and the principal's action was still technically available, the *condemnatio* or *absolutio* not affecting him. It was

therefore necessary for the *procurator* to give security against his principal's so suing. Where the representative was acting for the defendant the *procurator* had to give security himself that the judgment would be satisfied, but the principal had to give it for the *cognitor*.

In post-classical law the two types of representative were assimilated and under Justinian only the *procurator* remained, but now with the full representation that a *cognitor* had had (*i.e.* he no longer had to give security when suing). The use of *procuratio (in rem suam)* for assigning the benefit of an obligation has already been seen (*ante*, p. 387).

VI

Modes of Execution

At Rome the earliest form of execution was execution on the *person* of the debtor by *manus iniectio*. The form of execution by personal arrest remained a possibility until the end of the formulary procedure (*ante*, pp. 441, 444). Long before then, however, the praetors had introduced a more popular form of execution against the property of the debtor.

In *manus iniectio*, arrest and *addictio* did not affect the debtor's property, which remained his : only enslavement (when that was possible) affected it. Probably some time shortly before 100 B.C. a praetor named P. Rutilius Rufus introduced the institution of *bonorum venditio*. The praetor, on the petition of the creditors or some of them, granted *missio in bona*, *i.e.* made an order authorising them to take possession of all the debtor's estate. After an interval of thirty days from the time the property had been seized, during which other creditors could 'come in', *i.e.* join in the possession, the creditors met and elected a manager (*magister*) to conduct the sale, which, at the end of ten days more, took place by public auction. At the auction the estate of the debtor was sold as a whole to the highest bidder (*bonorum emptor*), who was bound to pay the other creditors the dividend he promised them by his bid and who thereupon became entitled under the edict to all the property of the debtor. Where the bankrupt was dead, the *emptor* could sue for debts owing to the estate by a *formula*

based on the fiction that he was heir (*actio Serviana*). If the bankrupt were alive, the *emptor* could sue by the *formula Rutiliana*, where the *intentio* was in the name of the person whose estate he had purchased, the *condemnatio* in his own. Conversely, creditors of the estate could sue him with the like fiction of heirship or by the *formula Rutiliana* respectively. To get in the corporeal property belonging to the estate the *emptor* had the *interdictum possessorium*.

This praetorian mode of execution may have been modelled upon the earlier *sectio bonorum*, which, however, was hardly execution properly so called, since it only applied where the State sold confiscated property (e.g. taken in war or from a citizen on a criminal conviction). The sale was made by the quaestors, and the highest bidder (*sector bonorum*) became not merely praetorian owner, but owner *ex iure Quiritium*, though to assist him in getting in the property he was granted the *interdictum sectorium*.

Bonorum venditio had three fundamental features: (i) it involved the sale of the debtor's *whole* estate; (ii) it rendered him *infamis*; and (iii) when the proceedings were over the debtor was not released. Since *bonorum venditio* was not one of the means of extinguishing obligations, the creditors could subsequently sue him and so attack his after-acquired property. Moreover, it was common to apply for *bonorum venditio* at the same time as making personal execution, though apparently one could pursue either course alone.

A more merciful method of execution, however, is mentioned by Gaius (*cessio bonorum*) as sometimes taking place in his time under the Julian law. This law, probably passed under Augustus, enabled a debtor to make a voluntary cession of his goods to his creditors, who sold them in satisfaction, *pro tanto*, of their claims. A debtor adopting this method avoided *infamia* and was allowed a *beneficium competentiae*, i.e. his creditors, though they might proceed against his after-acquired property, could not thereby deprive him of the bare necessities of life. *Cessio* was probably only available with praetorian consent after a full inquiry ensuring that there were genuine assets and that the insolvency was due to misfortune alone; otherwise, *bonorum venditio* in its full form had to take place. In the case of *clarae personae* (persons of rank) there was an alternative to *bonorum venditio* introduced by some

senatusconsultum, for the creditors could elect to have a *curator* appointed to sell piecemeal so much of the debtor's effects as would satisfy their claims (*distractio bonorum*): this avoided *infamia*.

Finally, under the *cognitio* system, the modern idea that execution for a debt does not necessarily involve the necessity of selling the debtor's whole property (except on insolvency) was arrived at, probably as a generalisation of the privilege formerly granted to *claræ personæ*. The execution of an unsatisfied judgment, if it was for a specific thing, was effected by directing its seizure and delivery to the plaintiff; and if for a specific sum, by the seizure of so much of the debtor's property as was sufficient to satisfy the judgment, a sale under the direction of the magistrate being made after two months. If no buyer could be found, the creditor could take the property seized in satisfaction of his claim.

In the time of Justinian personal arrest was probably, and *bonorum venditio* certainly, obsolete. In the case of ordinary execution (*i.e.* where the debtor was not insolvent), the procedure was as last described, *viz.* by seizure and sale of part of the debtor's property under the order of the Court; when the execution was in bankruptcy, the procedure (unless the debtor made a voluntary *cessio bonorum*) was by *distractio bonorum*, which had displaced the *bonorum venditio*, and under this a *successio per universitatem* no longer took place. The magistrate, on the application of the creditors, appointed a *curator*, who, after an interval of two or four years, sold the debtor's property in lots, the proceeds being divided up among the creditors. But even under this system the after-acquired property of the bankrupt could be seized by the creditors until they obtained payment in full.

VII

Restraints on Vexatious Litigation

Gaius tells us that vexatious conduct (*calumniā*) on the part of a *plaintiff* might be restrained by a *iudicium calumniae*, by a *iudicium contrarium*, by oath or by a restipulation. The *iudicium calumniae* was an order given to the judge to inquire,

in the event of the defendant's being absolved, whether the plaintiff's action was in fact merely vexatious; if it were, the plaintiff might be condemned in one-tenth of the value of the matter in dispute, save in the case of an *adsertor libertatis*, when the penalty was increased to one-third. This applied to all actions, and the defendant had the option either to have this remedy or to insist that the plaintiff should swear on oath (*iusiurandum*) that he had good ground for his action. The *iudicium contrarium* lay only in exceptional cases (e.g. in the *actio iniuriarum*) for a tenth or a fifth part of the claim; but it was a more stringent remedy than the *iudicium calumniae*, for the defendant was not required to prove *mala fides* on the part of the plaintiff, as in the latter proceeding; he was entitled to judgment merely on the ground that the plaintiff had lost his action, although the plaintiff brought it under a genuine misapprehension. When entitled to a *iudicium contrarium* the defendant might either demand a *iudicium calumniae* or require the plaintiff's oath, but the remedies were not cumulative. A fourth alternative to a defendant, under certain circumstances (i.e. where he was required, as in a *condictio*, to enter into a *sponsio poenalis*), was to demand that the plaintiff should promise a like sum if he failed, by *restipulatio*, and to this, upon acquittal, he was entitled without proof of malice.

In the time of Justinian all this had become obsolete. In certain cases, as also in the time of Gaius, no action could be brought without the magistrate's permission (e.g. against a parent or patron) and in all cases the plaintiff was obliged — (i) to swear on oath that he had good ground of action, a proceeding modelled on the old *iusiurandum*; and (ii), if he failed, to pay his opponent's costs.

A defendant in the time of Gaius was restrained from setting up a frivolous defence (i) because condemnation in some actions (e.g. *actio furti*, *iniuriarum*, *vi bonorum raptorum*, *pro socio*) made the defendant *infamis* (but in the first three even a compromise was sufficient to do so); (ii) in certain cases, defence increased the amount of his liability (*lis crescens*, e.g. under the *lex Aquilia*); (iii) in certain cases, as in a *condictio certae pecuniae* and an *actio de pecunia constituta*, the defendant could be made to promise (by a *sponsio*) a penalty if he failed, viz. a third of the value in the *condictio* and a half in the other action; (iv) failing other restraint, the praetor might require an oath that

the defendant had a good cause of defence and if he did not so swear he became an *indefensus*.

Under Justinian a defendant had in all cases to swear that he had a good defence and might still be liable to *infamia* in actions which involved it and also to pay increased damages in cases in which *lis crescens infitiando*. The fact, which both Gaius and Justinian mention, that some actions (e.g. *furti*) were for more than single damages *ab initio*, would rather act as a restraint on a person contemplating the wrong involved than as an inducement not to defend.

APPENDIX A

ENGLISH VERSIONS OF TYPICAL FORMULAE

THE purpose of this appendix is to set out simply examples of commonly used *formulae* with a view to showing the working of the formulary system and to illustrate the functions of the various clauses. For the fullest collection of *formulae* in Latin the student is referred to Lenel, *Das Edictum Perpetuum*, 3rd ed., 1927, and for a critical handling of the more important of them to Schulz, *Classical Roman Law*. After the first example the clause nominating the judge or *recuperatores* is here omitted although, of course, it was always present in every action. The *condemnatio* is phrased here in the third person, although there is reason to think that it may have been in the second, despite the fact that the *nominatio* was certainly in the third. The future imperative is translated by the slightly weaker 'the judge shall' rather than the archaic 'let the judge'. Aulus Agerius and Numerius Negidius were the Roman stock names for plaintiff and defendant respectively in formulary patterns and they are here represented as AA and NN. Where a *demonstratio* appears the introducing conjunction '*quod*' is translated as 'on the basis that' in an attempt to use as near a neutral term as possible in view of the considerable controversy as to its exact significance. Finally it must be stated that the phrasing of some of the forms is conjectural.

I. Actions *in rem*

(A) *Vindicatio rei*

'Titius shall be judge. If it appears that the X estate, the subject in issue, belongs to AA at civil law and it is not restored to him [in accordance with the judge's determination?], then the judge shall condemn NN to AA for as much money as the estate shall be worth. Otherwise he shall discharge him.

This is the basic *formula petitoria* of which all other actions *in rem* seem to be variations. After 'and it is not restored to him'

some add 'in accordance with the judge's determination', but this is now disputed (and with it the nomenclature of '*clausula arbitraria*' which is applied to the clause). Again '*quanti ea res erit*' is here translated as 'as much . . . as the estate shall be worth' but may in fact really have meant 'as much . . . as the plaintiff's interest shall amount to'. In any case the future tense makes it clear that the valuation is to be made as at time of judgment. There is no *demonstratio* in any *actio in rem*.

(B) *Actio Publiciana* (with *exceptio iusti dominii* and *replicatio rei venditae et traditae*)

'If, had AA for a full year been in possession of the slave he has in fact bought and taken delivery of, that slave, the subject in issue, would have belonged to him at civil law and if the slave has not been restored to him, then, unless NN is in fact lawful owner of the slave and AA did not buy and take delivery of him from NN, the judge shall condemn NN to AA for as much money as the slave shall be worth. Otherwise . . .'

The *formula* is basically the same as the *vindicatio* with a fiction of possession for the usucapion period. Perhaps the *exceptio* and *replicatio* would not normally be inserted in this *formula*, the praetor refusing the *exceptio* if the defendant admitted the sale.

II. Actions *in personam*

(A) *Condictio*—*actio certae pecuniae creditae* (with *exceptio pacti* and *replicatio doli mali*)

'If it appears that NN should pay AA ten thousand sesterces, then, if there has been no agreement between AA and NN that action should not be brought within six months or if there has been any fraud on the part of NN, the judge shall condemn NN to AA for the ten thousand sesterces. Otherwise . . .'

A simple *formula* calling for a *strictum iudicium* and therefore needing specific pleading of special defences and replies, it could be used wherever there was a simple duty to make payment, e.g. on a stipulation or on a loan. No *demonstratio*.

(B) *Condictio triticaria*—*certae rei* (with an *exceptio metus*)

'If it appears that NN should transfer to AA sixty measures of finest quality grain [the slave Stichus], then, so long as there

has been no duress in the matter, the judge shall condemn NN to AA for as much money as the cause of this action is now worth. Otherwise. . . .’

The obvious case for this *formula* would be where NN has promised AA non-specific goods by description (or some specific piece of property) by stipulation and NN wishes to be able to meet the claim by pleading duress inducing the promise. For such a plea AA need not have been privy to the duress. It is to be noted that the *condemnatio* is for ‘*quanti ea res est*’, thus making assessment depend on *litis contestatio* (i.e. the date when the *formula* first becomes legally effective). Contrast this feature of any *strictum iudicium* with, e.g., the *formula* of the *vindicatio*.

(C) *Actio ex stipulatu*

‘On the basis that AA has taken a promise by stipulation from NN for some uncertain performance, the date for which has now passed, the judge shall condemn NN to AA for whatever it appears NN ought on that account to hand over or do for AA. Otherwise . . .’

Since the claim is for an *incertum* it is not a *condictio* and it needs a *demonstratio*. The clause as to the passing of the date is essential where the promise is for a series of performances and AA wishes to retain his cause of action for such performances as are not yet due. The clause then, of course, has the function of a *praescriptio* limiting the consumptive effect of the *condemnatio*; it may, however, have been inserted as a matter of form or caution into all *formulae ex stipulatu*. It is not certain whether ‘it appears’ was normally inserted in this *formula* nor quite how the ‘otherwise . . .’ clause was exactly phrased. It is also possible that the praetor inserted a *taxatio* clause to limit the damages awardable.

(D) *Actio locati*

‘On the basis that AA hired out to NN a chariot for his use, the judge shall condemn NN to AA for whatever [it appears] NN ought on that account to hand over or do for AA as a matter of good faith. Otherwise . . .’

An example of a *formula* providing for a *bonae fidei iudicium*. It requires a *demonstratio*, the *condemnatio* being for an *incertum*. The insertion of ‘as a matter of good faith’ gives the judge power to consider all equitable pleas and defences.

(E) *Actio depositi* with (i) *formula in factum concepta*

'If it appears that AA deposited a silver table with NN and that because of the fraud of NN it has not been returned to AA, the judge shall condemn NN to AA for as much money as the object shall be worth. Otherwise. . . '

(ii) *formula in ius concepta*

'On the basis that AA deposited a silver table, the subject in issue, with NN, the judge shall condemn NN to AA for whatever [it appears] NN ought on that account to hand over or do for AA as a matter of good faith. Otherwise. . . '

The enigma of the coexistence of these two forms has not yet been definitely solved. It must be assumed, however, that (i) was the earlier. In it the judge's jurisdiction would seem to be confined to the strictly defined issues of fact, whereas in (ii) the '*ex fide bona*' phrase would give him much greater scope. The *condemnatio* in (i) is for the value of the *res* at the time of judgment. The same difficulties as with actions *in rem* occur over *quanti ea res erit*. The two *formulae* for *commodatum* are probably completely parallel, except that in (i) there would be no reference to the fraud of NN (upon which liability in *depositum*, but not in *commodatum*, rested) and in (ii) it is just conceivable that the words '*ex fide bona*' were omitted — but very improbable. (i) is an excellent example of a *formula in factum concepta*.

(F) *Actio furti nec manifesti* (against a peregrine)

'If it appears that theft of a gold cup from AA has been committed by NN or with his aid and assistance and on that account NN, had he been a Roman citizen, would have had to have made satisfaction as a thief, then the judge shall condemn NN to AA for twice the money that the object was worth at the time the theft was committed. Otherwise. . . '

This *formula in ius* has to contain a fiction of citizenship for the peregrine to be sued because the reference to the making of satisfaction (*damnum decidere*) brings out a definite *ius civile* liability. On the other hand, the *formula* makes no description of the plaintiff and so it may be used by anyone having the necessary *interesse* — in contrast with the unknown *formula* on the *lex Aquilia* whereunder AA would almost certainly have been described as owner. The '*quanti ea res fuit*' causes the same difficulties as in previous *formulae* — if it referred to loss rather than to value it would have

allowed variation of damages as to *interesse*. The rest of the *formula* speaks for itself. The *actio furti manifesti* had an unknown *formula in factum* because the action was a praetorian replacement for the summary treatment of the thief at civil law.

(G) *Actio iniuriarum*

‘On the basis that a blow was inflicted on AA with the intent of NN, then, provided not more than a year has elapsed since this action became available, the judge shall condemn NN to AA for as much money up to a maximum of ten thousand sesterces as it shall seem right and fair to the judge that NN should be condemned on that account to AA. Otherwise . . .’

A praetorian action *in factum*, but requiring a *demonstratio* because condemnation is for what the judge thinks *bonum et aequum*. The plaintiff fixes the *taxatio* at the highest sum he hopes to achieve. Were the *iniuria atrox*, the praetor would fix a definite sum which the judge would normally adhere to without question. The action was *annalis*. It may usually have been judged by *recuperatores* instead of a single judge.

III. Other Actions

(A) Examples of a *formula praeiudicialis*

(i) ‘Titius shall be judge whether AA is freeborn.’

A single question of fact requiring only an *intentio*. AA is claiming not to be a freedman.

(ii) ‘Titius shall be judge whether NN is the freedman of AA.’

The converse case — AA is claiming that NN is his freedman. The action is pre-judicial in the sense that a decision one way would be the first step towards the enforcement of a patron’s rights.

(B) *Actio communi dividundo*

‘On the basis that XX and YY have demanded that a judge should be granted them for the partition of their joint property, the judge shall assign to XX and YY as much as should be assigned. He shall also condemn the one to the other for whatever that one ought to pay to the other for equality. Otherwise. . . .’

The action, *mixta* according to Justinian, is in fact *in personam*. The main feature of it is the *adiudicatio* clause which calls for a *demonstratio*. The latter would normally be expanded to allow the judge to take into account any loss inflicted and allowed by any of the claimants in respect of the property and any appropriation by any of them. The *condemnatio*, which perhaps contained the clause *ex fide bona*, was necessary to allow balancing of the parties' interests.

APPENDIX B

A SHORT BIBLIOGRAPHY

THIS is intended to be merely an abbreviated guide to the reader to enable him to follow up any interests evoked by the text and to discover more detail. It is particularly intended for the benefit of students who are not attending lecture courses.

(I) FOR HISTORY AND SOURCES

Jolowicz, H. F. *Historical Introduction to the Study of Roman Law*, 2nd ed., 1954.

Schulz, F. *History of Roman Legal Science*, 1946.

Both are invaluable aids and both may be read in whole or in part with great profit. For Roman history generally :

Cary, M. *A History of Rome*, 2nd ed., 1954.

(II) FOR GENERAL PRINCIPLES AND THEORY

Buckland, W. W. *Main Institutions of Roman Private Law*, 1931.

Schulz, F. *Principles of Roman Law*, 1936.

The *Buckland* especially should add great interest to the study of the technical rules.

(III) FOR THE RULES OF ROMAN LAW GENERALLY AND FOR FURTHER REFERENCE

Buckland, W. W. *Textbook of Roman Law from Augustus to Justinian*, 2nd ed., 1932.

Schulz, F. *Classical Roman Law*, 1951.

For those who can read even only a little French, resort should be made to :

Girard, P. F. *Manuel élémentaire de droit romain*, 8th ed., 1929.

Monier, R. *Manuel élémentaire de droit romain* : Tome I, 6th ed., 1947 ; Tome II (Obligations), 4th ed., 1948.

(IV) ROMAN TEXTS

(1) The Latin texts of Justinian's *Corpus Iuris* should be available in all law libraries. For pre-Justinianic texts resort should be had to :

Girard, P. F. *Textes de droit romain*, 5th ed., 1923.

Bruns, C. G. *Fontes Iuris Romani Antiqui*, 7th edn., 1909.

(Various Editors.) *Fontes Iuris Romani Antejustiniani*, 3 vols., 2nd edn., 1941-43.

(2) For English Translations :

C. H. Monro began a translation of the *Digest* but died after completing about a quarter of the whole. Buckland added a translation of approximately two books so that two volumes now cover the first fifteen books of the work. Beyond this there is no really satisfactory English translation of other than selected titles and texts.

Monro himself also translated and commented upon various titles (e.g. 9.2, *de lege Aquilia*, 41.1 *de rerum acquirendo*), and such translations with commentaries have been undertaken by other scholars, notably by de Zulueta with his work on 41.1 and 2. It is to this type of work especially that the student who wishes to get a deep acquaintance with Roman law should address himself.

As regards the *Institutes* several valuable translations exist, and the student will probably find most readily available that by Moyle (published as a supplement to the Latin text and a commentary upon it) and the one made by Lee and incorporated in his *Elements of Roman Law*. As far as Gaius is concerned the student need look no further than the two volumes by de Zulueta constituting the text and its translations and a commentary upon it.

(V) MONOGRAPHS

There are a number of English works on particular topics of Roman law. To name, rather invidiously, just a few upon which this editor has learnt to rely :

Buckland, W. W. *Roman Law of Slavery*, 1908.

Corbett, P. E. *Roman Law of Marriage*, 1930.

Daube, D. *Forms of Roman Legislation*, 1956.

Duff, P. W. *Personality in Roman Private Law*, 1938.

In addition there has grown up a very welcome practice of publishing such works as accompaniments or introductions to the

relevant Roman texts with translation and notes. Three may be specially noted :

de Zulueta, F. *Roman Law of Sale*, 1945.

Jolowicz, H. F. *De Furtis*, 1940.

Lawson, F. H. *Negligence in the Civil Law*, 1950.

(VI) ARTICLES

As with monographs it is impossible to be exhaustive and unnecessary to point out more than the locations of the majority of them. The *Law Quarterly Review* contains probably the richest store of articles in English on Roman Law and some are particularly suited to interested students, *e.g.* the controversy on Chapter Three of the *Lex Aquilia*, with Jolowicz's view in 38 *L.Q.R.* 220 and Daube's in 52 *L.Q.R.* 253. The *Cambridge Law Journal* and the *Juridical Review* also contain many important contributions as do the various South African journals. In addition, there are many essays to be found written in English in foreign periodicals. Finally may be mentioned collections of essays, usually in honour of a distinguished scholar, the prime examples in English being *Studies in the Roman Law of Sale* in memory of de Zulueta and the first volume of *Acta Juridica* in honour of Lee.

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